SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DR. TERRY RAMNANAN, *Plaintiff,* v. COLIN KEIFFER, ESQ., INDIVIDUALLY, DETECTIVE WENDY BERG, INDIVIDUALLY, DETECTIVE GRACE PROETTA, INDIVIDUALLY, DETECTIVE JOHN CAMPANELLA, INDIVIDUALLY, RONALD HAYEK, D.C., INDIVIDUALLY, UNION WELLNESS CENTER PA LLC, ADAM AWARI, D.C., INDIVIDUALLY, AND ADVANCED CHIRO SPINE CENTER, P.C., *Defendants.*	CIVIL ACTION Docket No. A-002578-23 T4 ON APPEAL FROM SUPERIOR COURT LAW DIVISION BERGEN COUNTY Docket No. BER-L-002146-23 Honorable Mary F. Thuber, J.S.C. Sat Below

AMENDED
OPENING BRIEF FOR APELLANT
TERRY RAMNANAN

Submitted by:

On Brief:

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PRELIMINARY STATEMENT

This appeal – which raises numerous issues of first impression – stems from a conspiracy to falsify evidence and pursue a baseless prosecution against Plaintiff Dr. Terry Ramnanan. As alleged in the Complaint, State law enforcement officers (collectively, "State Defendants") charged two chiropractors (Defendants Hayek and Awari) with participating in an unlawful kickback scheme with various medical doctors. A symbiotic relationship formed: State Defendants needed incriminating evidence against Ramnanan to induce him to testify about the scheme (which he knew nothing about), and Hayek and Awari – eager to secure cooperation credit – agreed to manufacture that evidence.

It is presumed true at this juncture that the State Defendants elicited false statements about Ramnanan from Hayek and Awari; that State Defendants knew that there was no evidence of probable cause that Ramnanan committed a crime; and that they indicted him nonetheless based solely on Hayek and Awari's fabrications and based on a legal theory they knew to be legally frivolous. Indeed, the judge who eventually dismissed the indictment confirmed that, had the State Defendants not "misled the grand jury," no indictment would have been returned. These allegations made out all the necessary elements of a claim for fabrication of evidence, malicious prosecution, conspiracy, and IIED.

The instant appeal arises from the Superior Court's dismissal of each. The

Superior Court's decision is a veritable nesting doll of errors which, if affirmed, would dangerously restrict the ability of New Jersey citizens to pursue civil rights claims for investigative and prosecutorial misconduct.

To start, the court errantly held that the State Defendants enjoyed absolute immunity from suit. In reaching this conclusion, the court found that when the Legislature enacted the CRA in 2004, it intended *sub silencio* to displace New Jersey's common law rule of limited prosecutorial immunity – which withholds immunity from prosecutors who act maliciously – with Section 1983's absolute barrier. This finding is contrary to the text of the CRA (which is silent on immunities), its legislative history (which unambiguously expresses an intent to *expand* New Jersey citizens' ability to bring civil rights actions), and the bedrock principle that the Legislature does not derogate from the common law absent a clear and unmistakable expression of intent.

Compounding this error, the Superior Court endorsed the view that absolute immunity foreclosed Ramnanan's claims because they hinged on a finding that the decision to *initiate* the prosecution was invalid – a notion which, if true, would effectively extinguish all falsification of evidence and malicious prosecution claims.

The Superior Court's qualified immunity finding is equally error-ridden. It held that probable cause could be established on the basis of statements that the State

Defendants knew to be false; it impermissibly credited the State Defendants' denials of the facts pled in the Complaint; and it incorrectly held that probable cause is a complete defense to a falsification of evidence claim.

The Superior Court's dismissal of the claims against Hayek and Awari is similarly misguided. Its key finding – that prosecutorial "pressure" on Hayek and Awari to incriminate Ramnanan rendered their cooperation involuntary as a matter of law – disregards the Complaint's allegations and violates the uniform recognition that *all* cooperators face tremendous pressure to furnish usable evidence, but that does not render their decision to cooperate improperly "coerced" or "involuntary."

Next, the court found that Hayek and Awari were separately immune based on *Rehberg v. Paulk*, 566 U.S. 356 (2012), even though that case only extends immunity to witnesses who *appear* before a grand jury, which neither Hayek nor Awari did.

The court also erred in dismissing the IIED claims as time-barred. As the U.S. Supreme Court has made clear, where a claim is based on prosecutorial misconduct, the claim does not accrue until a favorable termination of proceedings. Because Ramnanan commenced this action within 16 months of the dismissal of his indictment, his IIED claims were timely brought.

These are but a few of the errors that infected the decision below. For the reasons set forth herein, that decision should be reversed in its entirety.

STATEMENT OF FACTS AND PROCEDURAL HISTORY[1]

A. Factual Background

The Hayek Investigation and the Fabricated "Kickback Spreadsheet"

The origins of Ramnanan's prosecution can be traced back to early 2016, when the State Defendants accused Defendant Ronald Hayek, a chiropractor, of engaging in a "kickback scheme" involving insurance fraud and commercial bribery. Pa31. Facing the prospect of a 20-year sentence and the loss of his license, Hayek entered into a plea agreement, pursuant to which prosecutors would recommend probation and the retention of his license in exchange for Hayek's cooperation in the broader "kickback scheme" investigation. Pa31-32.

Eager to receive cooperation credit, Hayek became an eager and willing participant in the investigation – even after it became clear that the State Defendants were intent on hatching false charges against doctors. Pa32. Hayek participated in two proffer sessions in March and April 2016. During the first session, Hayek admitted to participating in multiple conspiracies and identified numerous medical providers, but said nothing about Ramnanan. During the second proffer session, Hayek continued to offer evidence against other doctors, including one Dr. Todd Koppel, whom he claimed paid him cash referral fees every few months. Pa36.

[1] For clarity and the Court's convenience, the statement of facts and procedural history have been combined.

However, State Defendants insisted on more and, to satisfy their demands, Hayek concocted a story that Ramnanan had paid him more than $25,000 in unlawful referral fees. Pa32-33.

The State Defendants were fully aware that Hayek's claims against Ramnanan were false: Hayek had no records documenting any unlawful referral fees, and their own investigation had confirmed that Ramnanan's sole transfers to Hayek consisted of legitimate office rental payments. Pa33-34. However, State Defendants discerned that these demonstrably false allegations could be used as leverage to force Ramnanan's cooperation in an ongoing probe against Koppel. Pa36.

After Hayek's second proffer session, the State Defendants began to focus their investigation on Koppel, whom they believed was overseeing an extensive insurance fraud scheme with doctors and chiropractors throughout New Jersey. Pa36. However, by October 2016, their investigation had run aground. *Id*. Hoping that Ramnanan might have information about Koppel's scheme, Defendant Keiffer arranged a meeting on November 1, 2016 with Ramnanan and his attorney during which he probed Ramnanan for incriminating evidence about Koppel's activities. Pa37-38. When Ramnanan informed Keiffer that he had no knowledge of the scheme, Keiffer threatened him with prosecution. To bolster the threat, Keiffer presented him with a "Kickback Spreadsheet," purporting to show a list of patients that Hayek had referred to Ramnanan and the illegal kickbacks that Ramnanan had

paid in return. Pa39.[2] The spreadsheet, which Defendant Campanella and Hayek worked hand-in-hand created, was false in every respect. In addition to documenting kickbacks that never occurred, it included patients that Ramnanan had never treated, dates of service that postdated the termination of Ramnanan and Hayek's relationship, included duplicate transactions. These entries were not accidental: they were included to create the false impression that Ramnanan was facing significant criminal exposure. Pa39-41. A week after their meeting, Ramnanan's attorney informed Keiffer that the Kickback Spreadsheet was replete with inaccuracies. Pa41. That, however, did not dissuade the State Defendants from building upon that Spreadsheet to intimidate Ramnanan and, ultimately, using its contents to indict him.

The First Indictment

After an unsuccessful, multi-month pressure campaign to force Ramnanan to testify against Koppel, Keiffer decided to escalate matters by seeking an indictment. On August 1, 2017, Ramnanan was indicted for Conspiracy, Commercial Bribery, and Criminal Running, all in the third degree. The indictment alleged that Ramnanan had conspired with Hayek to engage in a medical fraud kickback scheme whereby Ramnanan paid Hayek referral illegal fees to perform EMG/NCV tests. Pa47. These charges were baseless on the facts and law. As the State Defendants knew, the only

[2] The Complaint also alleged that the State Defendants presented Ramnanan with a manipulated transcript of a recording of conversation between Hayek and Ramnanan. Pa42-46. Ramnanan is no longer pursuing that claim.

money Ramnanan ever paid to Hayek was monthly rent to lease office space. Not only were these payments completely legal, they were made by check, which left a transparent, verifiable paper trail. Pa47-48. There were no other witnesses, no evidence of monetary exchanges, no texts, emails, faxes, or recorded conversations substantiating the existence of such a scheme. The sole source of evidence consisted of Hayek's false statements and the specious Spreadsheet that Hayek and the State Defendants conspired to create. Pa48-49.

State Defendants Continue to Fabricate Evidence to Force Ramnanan's Cooperation

While the indictment was devastating to Ramnanan, it did not change the fact that he had no information that would assist the State Defendants in their investigation. And, unlike Hayek, Ramnanan was not willing to provide false testimony in exchange for a plea deal. Undaunted, the State Defendants fabricated more evidence to frighten Ramnanan into believing that he had more criminal exposure. Pa49.

Thus, in the early winter of 2017, the State Defendants collaborated with Hayek to create an Excel spreadsheet "Summary Chart," which expanded on the Kickback Spreadsheet. The Summary Chart purportedly showed that Ramnanan had paid Hayek $25,900 in referral fees. Pa51. Like the Kickback Spreadsheet, this document was patently false and State Defendants new it. Pa51-53, 286. Even with this falsified evidence, however, the State Defendants were approximately $44,000

short of the $75,000 threshold necessary to threaten Ramnanan with a second-degree offense. To make up for that shortfall, in winter of 2018, the State Defendants created an "Insurance Billing Chart" purporting to show $682,000 in insurance claims that Ramnanan had filed for procedures he performed after supposedly paying a referral fee. Pa53-54. According to the State Defendants, Ramnanan was legally obliged to disclose his referral fees to the insurance companies, who would have refused payment on the claim had they known. His failure to do so, the State Defendants' asserted, constituted criminal fraud. Pa233.

The State Defendants knew that their theory was defective from the ground up: the State Defendants knew that Ramnanan had not paid any unlawful kickbacks, their own investigation determined that many of the insurance companies did not consider the payment of referral fees a "material" fact when deciding whether to process insurance claims. Pa54-56. As the judge overseeing the criminal case would eventually rule, there was no evidence of "fraudulent claims," "over-billing or overcharging." Pa55.

Awari Investigation

On March 9, 2018, Defendant Awari entered into a plea agreement whereby he would avoid fraud, commercial bribery, criminal running, and conspiracy charges in exchange for cooperating in the State Defendants' ongoing investigation. Pa59. Like Hayek, Awari initially said nothing about Ramnanan during the first proffer

session. However, over the course of the session, the State Defendants insisted that he provide a statement against Ramnanan, going so far as to spoon-fed Awari the information as to which they wanted him to attest (namely, that Ramnanan paid $500 per referral, in envelopes of cash). Hoping to secure additional leniency, Awari obediently parroted back these in the form of a statement. Pa60-63.

Awari's claims about Ramnanan were false and State Defendants knew it. Awari was unable to supply any evidence of unlawful referral payments: there were no texts, emails, payment records, faxes, phone records, recordings, or witness statements. In fact, Awari and Ramnanan had a perfectly legal practice of referring patients to each other. Pa60-61.

Second Indictment

Having failed to bully Ramnanan into testifying about Koppel's scheme, about which he knew nothing, the State Defendants escalated matters further. On May 31, 2018, Ramnanan was charged in a 10-count Superseding Indictment with the following:

Count 1: Conspiracy in the Second Degree (N.J.S.A. 2C:5-2)
Count 2: Misconduct by a Corporate Official-Second Degree (N.J.S.A. 21-9)
Count 3: Health Care Claims Fraud-Second Degree (N.J.S.A. 2C:21- 4.3a)
Count 4: Theft by Deception-Second Degree (N.J.S.A. 2C:20-4)
Count 5: Commercial Bribery and Breach of Duty to Act Disinterestedly-Third Degree (N.J.S.A. 2C:21-10a(2) and 21-10c)
Count 6: Criminal Running-Third Degree (N.J.S.A. 2C:21-22.1)
Count 7: Conspiracy-Second Degree (N.J.S.A. 2C:5-2)
Count 8: Health Care Claims Fraud-Second Degree (N.J.S.A. 2C:21-4a)

Count 9: Commercial Bribery and Breach of Duty to Act Disinterestedly-Third Degree (N.J.S.A. 2C:21- 10a(3) & 21-10c)
Count 10: Criminal Running-Third Degree (N.J.S.A. 2C:21-22.1)

Pa56-57. The only "evidence" of probable cause to indict on Counts 1-6 was the false testimony that the State Defendants elicited from Hayek, and for Counts 7-10, the false evidence it obtained from Awari. Pa57.

Within days of the Superseding Indictment, Hayek recanted or substantially altered most of his testimony against Ramnanan in a sworn deposition given in an unrelated matter. Pa33-34. Nonetheless, State Defendants continued to pursue their prosecution. As a result, Ramnanan was forced to defend himself against baseless criminal charges for almost two years, during which time his bank accounts were seized, his professional reputation ruined, and his medical practice irreparably damaged. Pa56.

Judge Vinci Dismisses the Indictment

Ramnanan moved to dismiss the Superseding Indictment. On May 23, 2019, the Honorable Robert M. Vinci concluded at the end of the motion hearing that "the evidence [was] clearly lacking support in the charge[s]" and granted the request for dismissal. Pa64, 237-39, 241.

As to Health Care Claim Fraud charges (Counts 3 and 8), the court noted that the statute only criminalized *material* misrepresentations or omissions to insurance companies but that, here, even the State conceded that Ramnanan had only made

"legitimate claims for necessary services provided by qualified providers to insured patients." Pa71, 232. There were no "allegations of over-billing, over-prescribing, or fraud, or any type of fraud, other than the alleged payment of the referral fees;" no allegations that Ramnanan had misrepresented the payment of referral fees; and, most importantly, the evidence clearly showed that most insurance companies did not require the disclosure of referral fees. Pa71, 233-34. The court explained that nothing in the statute required such a disclosure, that the information was not considered "material" by most insurance companies, and that the insurers would have been "contractually obligated to pay or reimburse" regardless. Pa235. Thus, the court concluded, "based on the clear and unambiguous language of [the charging statute,] defendant did not commit an act of healthcare claim fraud." Pa55, 237.

The court chastised the State Defendants for relying on "vague and ambiguous testimony" about whether insurance companies considered referral fees material to payment, and for falsely telling the jury that there was "'substantial case law" including a Supreme Court decision supporting their theory. Pa237-38. This representation, the court found, was a "gross overstatement" of Supreme Court authority: "it was extremely misleading to tell the grand jury that the United State Supreme Court issued a decision supporting the State's legal theory when that simply is not true." Pa66, 238. The court also faulted the State Defendants for concealing exculpatory evidence from the grand jury, including the fact that the

insurance companies continued to pay Ramnanan's insurance claims even after learning of the indictment – "strong evidence that [the failure to disclose any referral payments] was not material." Pa239.

The court dismissed the Theft by Deception charge (Count 4) for similar reasons: the charge was based on the unsupportable theory that Ramnanan deceived the insurance companies by not disclosing the referral payments. Pa239-40. In addition, the court noted, appellate courts had repeatedly held that this sort of allegation sounded in contract, not in criminal law. Pa240.

The court also found that the State Defendants had deliberately misled the grand jury by aggregating all the insurance claims into one lump sum. As the court explained, "[t]he State knew that it could not establish that all of the insurers would have denied the claims" because many insurers explained to investigators that they did not consider referral payments in deciding whether to pay out the claim; "yet, the State went ahead and told the grand jurors that all . . . of the insurers would have denied all of the claims when it . . . aggregated all of the amounts paid to Hayek and Awari." Pa55-56, 241.

As to the Criminal Use of Runners charge (Counts 6 and 10), the court noted that the statute explicitly permitted chiropractors like Hayek and Awari to refer

patients to treating physicians. Pa241-42.[3] The court upbraided the State Defendants for failing to provide "any authority" – "absolutely nothing, not a single piece of paper, not a single citation to anything that could possibly support charging the defendant under this statute, which by its . . . plain reading [Ramnanan] did not violate." Pa244.[4]

The court concluded by assailing the State Defendants' conduct, finding that the "state intentionally subverted the grand jury process resulting in a grand jury presentation that was fundamentally unfair"; that they "deceived the grand jury" in their presentation of the law; that their representation of the case law was "flat out wrong"; that they "knew the [Criminal Use of a Runner] claim failed as a matter of law"; that they "plainly knew" but deliberately concealed from the jurors that "Hayek and Awari were authorized to refer patients and could not qualify as runners"; that they lied to the jury by asserting that all insurance companies considered the referrals material when "[t]he State absolutely knew that at least some

[3] The Criminal Use of Runners statute prohibits a person from knowingly driving customers or patients to professionals who are making fraudulent claims against insurance companies, insured people, or public health programs. *See generally* N.J.S.A. 2C:21-22.1.

[4] The court dismissed the Misconduct by a Corporate Official charge (Count 2) on the same grounds and dismissed the remaining charges (Counts 1, 5, 7, and 9) without prejudice. *Id.* at 37.

of the insurers" were indifferent to referral payments. Pa64-65, 244. In sum, the court held:

> [T]he State lost sight of its obligation to do justice and instead sought to indict [Ramnanan] on the most serious charges it could present. Had the State not misled the grand jurors regarding the law applicable to the charges and had the State not charged [the] defendant improperly . . . and had the State not misled the grand jury . . . the Court is not convinced the grand jury would have indicted the defendant.
>
> [Pa64, 244]

B. Procedural History

Ramnanan's Federal Lawsuit

On September 16, 2020, 16 months after the indictment's dismissal, Ramnanan filed a complaint in federal court alleging claims under 28 U.S.C. § 1983 and the New Jersey Civil Rights Act ("CRA") for fabrication of evidence, malicious prosecution, abuse of process, conspiracy, and intentional infliction of emotional distress ("IIED"). On July 30, 2021, the District Court (Judge Martinotti) dismissed the § 1983 claims, without prejudice, ruling the State Defendants were entitled to absolute immunity and that the Complaint failed to plead that Hayek and Awari were state actors. *Ramnanan v. Keiffer*, 2021 U.S. Dist. LEXIS 121980, at *23-28, 33-35 (D.N.J. June 30, 2021) (internal quotation marks omitted). The Court did not reach the state law claims. *Id.* at *39-40.

Ramnanan filed a Second Amended Complaint, clarifying that the State Defendants fabricated evidence during the investigation stage to compel Ramnanan

to cooperate against Koppel, and that Hayek and Awari furnished the false testimony to secure the benefit of the cooperation agreement. On March 24, 2023, the District Court (Judge Quraishi) again dismissed the § 1983 claims. The court found that the Complaint alleged misconduct during the investigative stage, which was not shielded by absolute immunity; however, it concluded that the fabrication of evidence and malicious prosecutions were nonetheless barred because they necessarily challenged the propriety of the decision to bring charges – a decision that was subject to absolute immunity. *Ramnanan v. Keiffer*, 2023 U.S. Dist. LEXIS 52623, at *20-25 (D.N.J. Mar. 24, 2023). As to the claims against Hayek and Awari, the court held that the Complaint did not allege with sufficient clarity the nature of their conspiracy to violate Ramnanan's civil rights. *Id.* at *25. The court dismissed the Section 1983 malicious prosecution and conspiracy claims with prejudice, the remaining claims without prejudice, and declined to exercise supplemental jurisdiction over the state law claims. *Id.* at *28

Decision Below

On April 24, 2023, Ramnanan filed the instant Complaint in Superior Court alleging fabrication of evidence, malicious prosecution, violation of substantive due process, conspiracy, and IIED – all but the last of which was brought pursuant to the CRA.

On March 29, 2024, the Superior Court dismissed the Complaint in its entirety. The court held that because the CRA is patterned after Section 1983, the Legislature intended courts to apply the federal rule of absolute prosecutorial immunity to fabrication of evidence and malicious prosecution claims, not the more limited state law immunity rule. Pa11. The court then claimed to adopt the federal district court opinions' conclusion that the alleged misconduct was "intimately associated with the judicial phase of the criminal process," and that, accordingly, the State Defendants were entitled to absolute immunity. Pa12.

The Superior Court also held that State Defendants' enjoyed qualified immunity. In reaching that conclusion, the court made a series of disjointed findings. First, it explained that it would only analyze the fabrication of evidence claim, thereby inexplicably ignoring Ramnanan's malicious prosecution claim. Then it held that Ramnanan's fabrication of evidence claim failed "because Hayek's statements, and later those of Awari, that plaintiff paid them referrals, were sufficient to establish probable cause." Pa15. The order did not address the Complaint's allegations that these statements were false and suborned by State Defendants to frame Ramnanan; nor did it address Judge Vinci's finding that there was no probable cause to indict Ramnanan. Turning to the Summary Chart, Kickback Spreadsheet, and Insurance Billing Chart, the court cryptically remarked that "plaintiff was not induced by [these documents] to do anything differently." Pa16. The court then summarized the State

Defendants' arguments that these documents were not false and misleading because (i) "the charges under consideration included conspiracy, and therefore transactions by co-conspirators were appropriate inclusion," and (ii) the Insurance Billing Chart listed claims that the insurance companies would not have paid had Ramnanan disclosed the referral fees. Pa17. Without explicitly saying so, the court appears to have endorsed these contentions. In doing so, the court did not address the allegations that Defendants had fabricated any and all evidence that Ramnanan participated in an unlawful conspiracy, nor did it engage Judge Vinci's findings that the State Defendants' own investigation had determined that many insurance companies were indifferent to the payment of referral fees. Having found that the Complaint failed to plead a constitutional violation, the court also dismissed the conspiracy claim. Pa18.

Next, the court dismissed the IIED claim on untimeliness grounds. The court refused, without explanation, to apply the accrual rule set forth in *McDonough v. Smith*, 139 S. Ct. 2149 (2019), which provides that any claim based on malicious prosecution and fabricated evidence will not accrue until the favorable termination of criminal proceedings. Instead, the court held that the claim accrued as early as 2017, when Ramnanan's counsel realized that the Kickback Spreadsheet contained errors, or – at the latest – in May 2018, when the Superseding Indictment was filed. Pa18-19, 23-24. Because the IIED claims were subject to a two-year statute of

limitations, and because Ramnanan filed his first complaint 28 months after the Superseding Indictment, the court concluded that his IIED claim was time-barred. *Id.*

Next, the court turned to the CRA claims against Hayek and Awari. The court dismissed all of said claims on the grounds that the Complaint failed to plead that Hayek and Awari acted "under the color" of state law. Specifically, the court found that the Complaint's allegations that the State Defendants "put words in Awari's mouth, invented facts that Awari did not mention, continuously fed answers to Awari, and presented him with leading, coercive, and improperly suggestive questions" foreclosed any finding that Awari was a "willful participant" in the State's scheme to manufacture evidence against Ramnanan. Pa20. Likewise, the court concluded that the Complaint's allegations that the State Defendants "relentlessly pressured" Hayek into providing false evidence against Ramnanan were "inconsistent" with the theory that he provided false information out of "self-interest." Pa22.

Finally, the court found that the claims against Hayek and Awari were independently foreclosed by *Rehberg v. Paulk*, 566 U.S. 356 (2012), which affords absolute immunity to grand jury witnesses, Pa22-23 – a puzzling finding, given that neither Hayek nor Awari ever testified before the grand jury.

STANDARD OF REVIEW

In determining whether to grant a motion to dismiss under Rule 4:6-2(e), "the complaint's allegations are accepted as true with all favorable inferences accorded to plaintiff." *Id*. A court must consider only "the legal sufficiency of the facts alleged on the face of the complaint[,]" *Nostrame v. Santiago*, 213 N.J. 109, 127 (2013), and must search the complaint "in depth and with liberality to ascertain whether the fundament of a cause of action may be gleaned even from an obscure statement of a claim[.]" *Mac Prop. Grp. LLC & The Cake Boutique LLC v. Selective Fire & Cas. Ins. Co.*, 473 N.J. Super. 1, 16 (App. Div. 2022). Review of orders granting a motion to dismiss are *de novo* and apply the same standard as the motion court. *Frederick v. Smith*, 416 N.J. Super. 594, 597, 7 A.3d 780 (App. Div. 2010). In conducting that review, the Appellate Division "owe[s] no deference to the . . . [lower court's] conclusions." *Mac Prop. Grp. LLC*, 473 N.J. Super. at 16.

ARGUMENT

I. THE SUPERIOR COURT ERRONEOUSLY HELD THAT RAMNANAN'S CRA CLAIMS WERE SUBJECT TO SECTION 1983's RULE OF ABSOLUTE PROSECUTORIAL IMMUNITY (Pa9-13)

The Superior Court's holding that the CRA incorporated the federal rule of absolute prosecutorial immunity is contrary to the CRA's text, legislative history, and nearly 75 years of precedent confirming that New Jersey law does not confer immunity on prosecutors who act out of personal motive or with malicious intent.

In an unbroken line of cases going back to 1953, the New Jersey Supreme Court has rejected the federal rule and reiterated that prosecutors only enjoy limited immunity against civil suits. Thus, in *Earl v. Winne*, the Supreme Court held that prosecutors who act "in excess of and distinct from their required official duty for personal reasons of their own" may be held "civilly liable . . . in actions for malicious prosecution and malicious abuse of process." 14 N.J. 119, 134 (1953). In *Cashen v. Spann*, 66 N.J. 541 (1975), the Court once again rejected an invitation to extend absolute immunity to prosecutors. The Court recognized that federal courts routinely accorded prosecutors the same absolute immunity as judges. *Id.* at 548. Nonetheless, the Court concluded that there were "persuasive reasons for not equating the two forms of immunity" and that "the public interest is best served" by a rule that that withholds immunity from prosecutors who are alleged to have "acted out of personal motive, with malicious intent, or in excess of [their] jurisdiction." *Id.* at 548, 552.

There is no dispute that *Earl* and *Cashen* remain good law. Even after the U.S. Supreme Court endorsed absolute prosecutorial immunity under Section 1983, *see Imbler v. Pachtman*, 424 U.S. 409 (1976), New Jersey courts reaffirmed their commitment to limited prosecutorial immunity. *See, e.g.*, *Geyer v. Faiella,* 279 N.J. Super. 386, 392 (Super. Ct. App. Div. 1995) ("[P]rosecuting officials are not immunized under the law of this State for conduct constituting actual malice such as making knowingly false charges. In short, a prosecutor's conduct is not absolutely

privileged at the charging stage."); *Burke v. Deiner*, 97 N.J. 465, 471 (1984) (recognizing that New Jersey courts have "construed the absolute privilege more narrowly" than federal courts); *Mancini v. Lester*, 630 F.2d 990, 995 (3d Cir. 1980) ("[T]he common law of New Jersey has for many years refused to extend absolute immunity to state prosecutors."). This is not merely a matter of judicial practice: the Legislature has codified the limited immunity rule in the Tort Claims Act ("TCA"). *See* N.J.S.A. 59:3-14a (no immunity where official acts with "actual malice or [engage in] willful misconduct"); *see also Van Engelen v. O'Leary*, 323 N.J. Super. 141, 150 n.3 (Super. Ct. App. Div. 1999) (statutory immunity conferred by the TCA codifies "that established by pre-existing common law"); *Cashen*, 66 N.J. at 551, n.4 (scope of prosecutorial immunity is the same under the TCA and common law). In sum, when the Legislature enacted the CRA, it did so against the backdrop of decades of statutory and decisional authority embracing limited prosecutorial immunity.

The notion that the Legislature abandoned that rule when it enacted the CRA defies every rule or statutory construction and gravely misreads the CRA's legislative history. The Superior Court's sole support for this holding consists of a handful of sparsely reasoned, unpublished opinions, Pa12,[5] none of which engaged

[5] Though the Superior Court order does not specify which cases it relied on, it appears to have been referring to *Gensinger v. Reyes*, 2020 N.J. Super. Unpub. LEXIS 2221, at *9 (N.J. Super. Ct. App. Div. Nov. 16, 2020), *Small v. State*, 2015

Cashen or the TCA, nor undertook a rigorous analysis of the legislative history.[6] Instead, these decisions seized on a legislative statement that the CRA was "modeled" after Section 1983 and, from that, leapt to the faulty conclusion that the Legislature intended *sub silencio* the wholesale displacement of state law immunity principles with their Section 1983 counterparts – even where doing so would effectively extinguish an entire class of previously viable fabrication of evidence and malicious prosecution claims. This holding is untenable for myriad reasons.

To start, it violates the bedrock principle that the Legislature is never presumed to have intended to "depart from the common law" or abrogate a common law right "unless that intent is unmistakable," *Bd. of Educ., Borough of Union Beach v. NJ Education Assoc*., 53 N.J. 29, 46 (1968) – *especially* when enacting a remedial statute. *D'Annunzio v. Prudential Ins. Co. of Am.*, 192 N.J. 110, 120 (2007) (remedial statutes must be liberally construed). It is well-established that, absent "a clear legislative expression to the contrary, a statutory right or remedy does not preempt an existing common law right in remedy; but, rather, is deemed to be *additional to*

N.J. Super. Unpub. LEXIS 530, at *6 (N.J. Super. Ct. App. Div. Mar. 12, 2015), and *Bovery v. Monmouth Cnty. Prosecutor's Off*., 2020 N.J. Super. Unpub. LEXIS 1721, at *12 (N.J. Super. Ct. App. Div. Sept. 16, 2020).

[6] No state or federal court has undertaken a detailed analysis of this question. However, most federal court decisions have recognized that CRA claims are subject to state law limited immunity. *Louis v. New Jersey*, 2023 U.S. Dist. LEXIS 106055, at *20 (D.N.J. June 16, 2023); *Kirby v. Borough of Woodcliff Lake,* 2021 U.S. Dist. LEXIS 238521, at *15 (D.N.J. Dec. 14, 2021); *Pitman v. Ottehberg*, 2015 U.S. Dist. LEXIS 4438, at *27 (D.N.J. Jan. 14, 2015).

or cumulative of the latter." *Terrace Condo. Ass'n v. Midatlantic Nat'l Bank*, 268 N.J. Super. 488, 500 (Law. Div. 1993) (emphasis added); *Blackman v. Iles*, 4 N.J. 82, 89 (1950) ("A statute may take away a common law right but there is always a presumption that the Legislature had no such intention."); *Aden v. Fortsh*, 169 N.J. 64, 85 (2001); *cf. Federal Marine Terminals, Inc. v. Burnside Shipping Co. Ltd.*, 394 U.S. 404, 412 (1969) ("the legislative grant of a new right does not ordinarily cut off or preclude other nonstatutory rights in the absence of clear language to that effect.").

Here, there is zero indication – far be it a clear and unmistakable expression – that the Legislature intended to abrogate New Jersey's limited immunity rule, much less that it intended to close the door on malicious prosecution claims by adopting the harsher and much-maligned[7] standard set forth in *Imbler.* To the contrary, every legislative pronouncement confirms that the CRA was enacted to *broaden* the scope of New Jersey's civil rights protections. *See, e.g., Owens v. Feigin*, 194 N.J. 607, 611 (2008) (CRA's "broad purpose is to assur[e] a state law cause of action for violations of state and federal constitutional rights and to fill any gaps in state statutory anti-discrimination protection.") (collecting cases); *accord*

[7] *See, e.g.,* David Keenan, Deborah Jane Cooper, David Lebowitz & Tamar Lerer, *The Myth of Prosecutorial Accountability After Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect Against Prosecutorial Misconduct*, 121 Yale L.J. Online 203 (2011) (describing how the alternatives to civil accountability that *Imbler* contemplated – *e.g.*, criminal prosecution and disbarment – have not deterred prosecutorial misconduct).

Perez v. Zagami, LLC, 218 N.J. 202, 212 (2014); S. Judiciary Comm. Statement to S. No. 1558, 211th Leg. 1 (May 6, 2004) (CRA intended to "provide the citizens of New Jersey with a *State* remedy for deprivation of or interference with the civil rights of an individual" and to fill "potential gaps which may exist" under preexisting state civil rights laws.") (emphasis in original). As the New Jersey Supreme Court observed, the oft-cited "'gap-filling' language [in the CRA] implies that the Legislature intended to expand the remedies already provided to victims [of civil rights abuses]" – if the Legislature had intended to constrain a victim's ability to pursue their claims by extinguishing the statutory or common law limitations on immunity defenses, "it undoubtedly would have said so." *Tumpson v. Farina*, 218 N.J. 450, 474 (2014).[8]

Not only did the Legislature give no hints that it contemplated that courts would swap out state law immunities for their Section 1983 analogues, it explicitly patterned its CRA on the Massachusetts Civil Rights Act, *see Ramos v. Flowers*, 429 N.J. Super. 13, 23 (Super. Ct. App. Div. 2012) – a law which the Massachusetts Supreme Court held *preserved* pre-existing immunity defenses. *Breault v. Chairman of Bd. of Fire Comm'rs*, 401 Mass. 26 (1987). *Breault* confronted a substantively

[8] The idea that the Legislature intended to rewrite immunity defenses is also inconsistent with the Governor's signing statement, which provided that "statutory causes of action will incorporate and integrate seamlessly with the existing jurisprudence that protects civil rights." Press Release, Office of the Governor, Governor's Statement Upon Signing Assembly Bill 2073 (Sept. 10, 2004).

identical issue – namely, whether the CRA wiped away limitations on immunities that were codified in the TCA. The Massachusetts CRA, like New Jersey's, makes no provision for immunities; and like New Jersey, Massachusetts codified a limited immunity rule in its TCA prior to passing its CRA. *Breault* concluded that it was "both logical and likely that the Legislature viewed the later legislation in light of the earlier enactment, and intended to withhold immunity from officials who intentionally violated the [CRA], just as the Tort Claims Act withholds immunity from intentional tortfeasors." *Id.* at 36. Crucially, the Massachusetts Supreme Court conducted this analysis without ever referencing federal immunity law. It is eminently reasonable to suppose that the New Jersey Legislature was aware of *Breault* when it chose to list Massachusetts's CRA as an exemplar.

Contrary to the Superior Court's assumption, the Legislature's decision to model the CRA on Section 1983 was not a directive for courts to reflexively incorporate every one of Section 1983's substantive rules.[9] The directive, properly understood, is for courts to use the "tests" devised in the Section 1983 context as "guidance in construing [the CRA]," provided those tests are "adapted" to account

[9] *Cruz v. Camden Cty. Police Dep't*, 466 N.J. Super. 1 (Super. Ct. App. Div. 2021), confirms as much. In that case, the Appellate Division partially adopted the rule in *Rehberg v. Paulk*, 566 U.S. 356 (2012), which conferred broad immunity for all testimony before a grand jury, but pointedly refused to extend *Rehberg* immunity to those who had given false testimony. 466 N.J. Super. at 10. If, as State Defendants suppose, all federal immunity doctrines were reflexively imported, Cruz would not have been selective in the portions of the immunity rule that it adopted.

for the "distinct differences" between the two statutes. *Tumpson*, 218 N.J. at 476-77. The need for this adaptation is obvious: as with any statute, the court's ultimate goal is to determine what the New Jersey Legislature intended in 2004 when it enacted the CRA – not what Congress intended when it enacted Section 1983 in 1871. *State v. Harper*, 229 N.J. 228, 237 (2017) (internal quotation marks omitted) ("A court's responsibility is to give effect to the intent of the Legislature."); *Tumpson*, 218 N.J. at 476-77 (invoking the Section 1983 *Blessing* test to determine when state law confers a substantive right, but emphasizing that the test must "adapted" to account for the fact that the CRA is "of recent vintage" and reflects a different legislative intent than that embodied in Section 1983). But if one applies the Section 1983 test to ascertain the scope of CRA immunities, one reaches the same conclusion: the CRA only recognizes limited immunity.

Because Section 1983 (like the CRA) is silent in regard to immunities, federal courts conduct a two-party inquiry. First, they inquire into whether an analogous immunity was recognized when Congress enacted Section 1983. *Malley v. Briggs*, 475 U.S. 335, 339-40 (1986). If so, the immunity is presumed to have survived Section 1983's enactment. *See City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 258 (1981) (legislators who enacted Section 1983 were "familiar with common-law principles, including defenses previously recognized in ordinary tort litigation, and . . . likely intended these common-law principles to obtain, absent specific provisions

to the contrary."). Second, the court considers "both history and policy" to determine whether there is some reason not to incorporate an immunity defense into section 1983. *Id.* at 259. The U.S. Supreme Court used this test in *Imbler*: first, it surveyed the common law and determined that the "majority rule" recognized a principle analogous to absolute prosecutorial immunity; then, it held that "considerations of public policy" supported recognizing that rule in Section 1983 cases. *Imbler*, 424 U.S. at 421, 425.

Applying this two-part test to the CRA, as per *Tumpson*'s instructions, thus requires asking two questions: first, did New Jersey common law recognize limited prosecutorial immunity when the CRA was enacted; and, second, are there any reasons of public policy that demand abandonment of that rule. The answers to both questions are clear and indisputable: limited immunity was well-established at the time of the CRA's enactment, and both *Cashen* and the TCA confirm New Jersey's commitment to the view that the public interest is best served by a rule that exposes malicious prosecutors to civil liability.[10]

[10] The fact that federal courts have reached the opposite conclusion is no reason for New Jersey to reconsider its limited immunity rule. *State v. O'Neill*, 193 N.J. 148, 176 (2007) ("As tempting as it may be to harmonize results under state and national constitutions, our federalism permits state courts to provide greater protection to individual civil rights and liberties if they wish to do so.") (quotation marks omitted). New Jersey's refusal to adopt *Imbler* is in keeping with the State judiciary's long history of rejecting federal courts' public policy assessments and according greater rights to its citizens than those afforded under federal law. *See, e.g.*, *State v. Melvin*, 248 N.J. 321, 347 (2021) (citing cases); *State v. Andrews*, 243 N.J. 447, 483 (2020)

For these reasons, this Court should hold that prosecutors do not enjoy immunity under the CRA where they act with malice, personal reasons, or in excess of jurisdiction. And because the Complaint clearly alleges malice and personal motive, *see e.g.,* Pa31, 40, 42, the Court should reverse the finding that the State Defendants' actions are cloaked in immunity.

II. STATE DEFENDANTS ARE NOT ENTITLED TO ABSOLUTE IMMUNITY EVEN UNDER THE FEDERAL LAW STANDARD (Pa12-13)

To determine whether an official's conduct is cloaked in absolute prosecutorial immunity, federal courts use a "functional test" that focuses on "the nature of the function performed, not the identity of the actor who performed it." *Light v. Haws*, 472 F.3d 74, 80-81 (3d Cir. 2007). Under this test, absolute immunity attaches only to "advocacy" that is "'intimately associated with the judicial phases of litigation.'" *Fogle v. Sokol*, 957 F.3d 148, 160 (3d Cir. 2020) (quoting *Burns v. Reed*, 500 U.S. 478, 495 (1991)). The word "intimate" warrants emphasis: as the U.S. Supreme Court explained: "[a]lmost any action by a prosecutor, including his or her direct participation in purely investigative activity, could be said to be in some

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(common law privilege against self-incrimination broader than federal counterpart); *Usachenok v. State Dep't of the Treasury*, 257 N.J. 184, 195 (2024) (free expression); *State v. Chun*, 194 N.J. 54, 101-02 (2008) (equal protection guarantees); *State v. McAllister*, 184 N.J. 17, 28 (2005) (recognizing more robust right to privacy); *State v. Pierce*, 136 N.J. 184, 209 (1994) (search and seizure); *State v. Sanchez*, 129 N.J. 261, 274-75 (1992) (right to counsel).

way related to the ultimate decision whether to prosecute, but we have never indicated that absolute immunity is that expansive." *Burns*, 500 U.S. at 495. Thus, an officer enjoys absolute immunity for "soliciting false testimony from witnesses in grand jury proceedings and probable cause hearings, presenting a state's case at trial, and appearing before a judge to present evidence." *Fogle*, 957 F.3d at 160. By contrast, absolute immunity will not apply to "purely investigative activity." *Burns*, 500 U.S. at 495. While the boundary between advocacy and investigation is often blurry, courts have drawn a clear temporal line: a prosecutor does not enjoy immunity for actions taken prior to the establishment of probable cause. *Fogle*, 957 F.3d at 160.

State officials bear a "heavy burden of establishing entitlement to absolute immunity." *Odd v. Malone*, 538 F.3d 202, 207-08 (3d Cir. 2008) (internal quotation marks omitted). Thus, a court must "begin with the presumption that qualified rather than absolute immunity is appropriate," *id.* and, to overcome that presumption, the defendant must demonstrate "that absolute immunity should attach to *each act* [they] allegedly committed that gave rise to a cause of action." *Light*, 472 F.3d at 80 (emphasis added).

The Superior Court claimed to "adopt the reasoning of the two federal district court opinions holding that the state defendants are immune from prosecution for the claims brought under the NJCRA (Counts 1-4) because the underlying alleged facts

are 'intimately associated with the judicial phase of the criminal process.'" Opinion 12 (quoting *Fogel*, 957 F.3d 159-60). That is a faulty characterization of the federal court's finding. The May 24, 2023 Order held that absolute immunity did *not* apply to the evidentiary fabrications because they occurred during the investigative stage. *Ramnanan v. Keiffer*, 2023 U.S. Dist. LEXIS 52623, at *20 (D.N.J. Mar. 24, 2023). According to that order, absolute immunity foreclosed the claims not because the investigative misconduct was protected, but because Ramnanan could not plead a claim without calling into question the decision to initiate the prosecution – a decision which, the court concluded, is shielded from review by absolute immunity. *Id.* at *25-26.

The May 24 Order was correct insofar as it found that Ramnanan pled investigative misconduct. *See* Pa57-58 (alleging the manufacture of evidence "during the investigative phase); Pa36-38, 57-58 (alleging that State Defendants fabricated evidence to cajole Ramnanan into testifying against Koppel and only decided to indict after that tactic failed). Because the false evidence was manufactured during the investigation stage, and done "prior to the establishment of probable cause" (which, as the Complaint alleges, never existed), they fall outside the ambit of absolute immunity. *Fogle*, 957 F.3d at 160; *see Buckley v. Fitzsimmons*, 509 U.S. 259, 275-76 (1993) ("[a] prosecutor may not shield his investigative work

with the aegis of absolute immunity" by recasting investigative work as "'preparation' for a possible trial").

However, the notion, as set forth in the May 24 Order, that absolute immunity erects a barrier to any civil suit that would require an assessment of the decision to bring criminal charges is glaringly incorrect. Every malicious prosecution claim is, at core, an attack on the decision to indict – indeed, its defining elements are that the defendant "initiated the proceeding without probable cause" and "acted maliciously or for a purpose other than bringing the plaintiff to justice." *Johnson v. Knorr*, 477 F.3d 75, 82 (3d Cir. 2007). Likewise, every evidence falsification claim requires a showing of a "reasonable likelihood that, absent that fabricated evidence, [the plaintiff] would not have been criminally charged." *Black v. Montgomery Cty*., 835 F.3d 358, 371 (3d Cir. 2016). If the May 24 Order's interpretation of the law were correct, no one could ever state a malicious prosecution or fabrication of evidence claim.

Needless to say, the May 24 Order did not accurately state the law. It is, in fact, well-established that absolute immunity does not apply where officials are alleged to have falsified evidence to secure an indictment. *See, e.g.*, *Hof v. Janci*, 2018 U.S. Dist. LEXIS 203729, at *14 (D.N.J. Nov. 30, 2018); *Lopez-Siguenza v. Roddy*, 2014 U.S. Dist. LEXIS 43238, at *27 (D.N.J. Mar. 31, 2014) ("the conduct of witness interviews before filing a criminal complaint is not protected by absolute

immunity" even if those interviews are used before the grand jury) (citing *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992)); *Hill v. City of N.Y.*, 45 F.3d 653, 662 (2d Cir. 1995) (evidence fabricated to establish probable cause receives only qualified immunity, even if that same evidence is subsequently used to indict); *Morse v. Spitzer*, 2012 U.S. Dist. LEXIS 110241, at *26-28 (E.D.N.Y. Aug. 2, 2012) (same); *see also Black*, 835 F.3d at 370 (applying only qualified immunity to claim that officials used falsified evidence to indict); *Halsey v. Pfeiffer,* 750 F.3d 273, 292 (3d Cir. 2014) (same).

Accordingly, even if the CRA claims were subject to absolute prosecutorial immunity, the State Defendants could not avail themselves of that shield.

III. THE SUPERIOR COURT ERRED IN FINDING THAT STATE DEFENDANTS WERE ENTITLED TO QUALIFIED IMMUNITY (Pa13-18)

Courts use a two-prong test to determine whether a state office is entitled to qualified immunity. The first inquiry asks "whether the facts alleged, taken in the light most favorable to the party asserting the injury, show that the challenged conduct violated a statutory or constitutional right;" the second asks "whether the right was clearly established." *Morillo v. Torres*, 222 N.J. 104, 117-18 (2015) (cleaned up). The inquiry into qualified immunity "is fact intensive" and "generally ill-suited for resolution at the pleadings stage." *Onuekwusi v. Graham*, 2021 U.S. Dist. LEXIS 53208, at *27 (D.N.J. Mar. 19, 2021) (internal quotation marks

omitted); *Leveto v. Lapina*, 258 F.3d 156, 161 (3d Cir. 2001) ("[Q]ualified immunity will be upheld on a . . . motion [to dismiss] only when the immunity is established on the face of the complaint."). The defendant bears the burden of establishing qualified immunity. *Schneider v. Simonini*, 163 N.J. 336, 359 (2000). The State Defendants did not meet that burden here.

There is no dispute that the "right to be free from prosecutions on criminal charges that lack probable cause" is clearly established, *Andrews v. Scuilli*, 853 F.3d 690, 705 (3d Cir. 2017) (citing cases), as is the right not to be prosecuted based on falsified evidence. *Halsey*, 750 F.3d at 292; *Black*, 835 F.3d at 370. The Superior Court did not gainsay the clarity of the right in question; nor did it say anything whatsoever about the malicious prosecution claim.[11] Rather, it concluded that Ramnanan had failed to state a fabrication of evidence claim. Every aspect of this finding is riddled with errors.

[11] The most generous reading of this choice is that the Superior Court understood Ramnanan to be disavowing any claims based on the use of fabricated evidence during the Grand Jury proceedings. Pa17 (citing Compl. ¶ 210). While paragraph 210 inartfully states that Ramnanan does not "not seek redress for the State Defendants grossly improper conduct before the grand jury," Pa59, it is abundantly clear from the remainder of the Complaint that he does, in fact, seek redress for the use of falsified evidence to secure an indictment. *See, e.g.*, Pa74 (alleging that the fabrication of evidence led to "two separate indictments" which destroyed his reputation and impinged on his liberty); *id.* (alleging, in malicious prosecution section, that Defendants "initiated [baseless] criminal proceedings"). When the Complaint is read in its totality, it is clear that paragraph 210 is referring to the misconduct that Judge Vinci identified in his order – *e.g.*, the State Defendants' misrepresentations when advising the grand jury on the law. Pa238-40.

The court began its analysis by finding that Ramnanan's claim failed because Hayek and Awari's statements "were sufficient to establish probable cause." Pa15. This is wrong in quite literally every respect. First, this finding inexplicably ignores the Complaint's well-pled allegations – which are presumed true at this stage – that Hayek and Awari's statements were false and that the State Defendants knew that there was no evidence (apart from the evidence it manufactured) of Ramnanan paying unlawful kickbacks. Pa30. It also ignored Judge Vinci's conclusion that "the evidence [was] clearly lacking" to support the charges in the indictment, and that the grand jury would not have indicted but for the State Defendants' misconduct. Pa56, 64, 237, 239, 241. Second, the very existence of a dispute over probable cause precludes resolution on a motion to dismiss. *LoBiondo v. Schwartz*, 199 N.J. 62, 93 (2009) (probable cause determination must "be submitted to the jury if the facts giving rise to probable cause are themselves in dispute"); *Groman v. Twp. of Manalapan*, 47 F.3d 628, 635 (3d Cir. 1995) ("Generally, the existence of probable cause is a factual issue" for the jury to decide.). Third, lack of probable cause is not even an element of a fabrication of evidence claim – thus, its absence has no bearing on the viability of this claim. *Halsey*, 750 F.3d at 289 ("When falsified evidence is used as a basis to initiate the prosecution of a defendant, . . . the defendant has been injured regardless of whether the totality of the evidence, excluding the fabricated evidence, would have given the state actor a probable cause defense in a malicious

prosecution action that a defendant later brought against him."); *Black*, 835 F.3d at 369. Finally, where probable cause *is* a defense (*i.e.*, on the malicious prosecution claim), the defendants bear the burden of establishing probable cause as to "each individual charge." *Johnson v. Knorr*, 477 F.3d 75, 85 (3d Cir. 2007). The State Defendants did not even attempt to separately articulate how probable cause existed for each of the 10 charges, nor could they have in light of Judge Vinci's findings to the contrary.

Next, the Superior Court endorsed the State Defendants' contention that the Kickback Spreadsheet, Summary Chart, and Insurance Billing Chart were accurate and proper. Incredibly, the court did not even bother to engage the allegation that these documents were amalgamated from Hayek and Awari's false statements, or that the State Defendants knew that the Insurance Billing Chart misrepresented that insurance companies would have withheld payment had they known about the alleged kickbacks. Instead, the court only addressed *one* of the many objections that the Complaint voiced about the charts and spreadsheets – namely, that they included patients that Ramnanan did not see and procedures he did not perform. The court held that these entries were "appropriate for inclusion" "because the charges under consideration included conspiracy." Pa17. That argument was a red herring to begin with: Ramnanan could only be held liable for the actions of his co-conspirators *if he*

actually took part in an unlawful conspiracy.[12] But the Complaint alleges that Ramnanan was innocent of any wrongdoing, that he never received any unlawful referral fees, that every piece of incriminating evidence was cooked up by the State Defendants, and that there was no basis in law to charge him.

Because those well-pled allegations are presumed true at the motion to dismiss stage, and because the fabrication of evidence and prosecution without probable cause violated Ramnanan's clearly established rights, the finding that State Defendants are entitled to qualified immunity must be reversed.

IV. THE SUPERIOR COURT ERRONEOUSLY FOUND THAT AWARI AND HAYEK DID NOT ACT UNDER COLOR OF LAW (Pa19-22)

Like Section 1983, the CRA permits a plaintiff to bring a claim against a private person who acts "under color of law." *Perez*, 218 N.J. at 215. To state such a claim, the plaintiff must allege that the private actor was a "willful participant in joint action with the State or its agents." *Dennis v. Sparks*, 449 U.S. 24, 27 (1980). A private party will be deemed a willful participant in a joint action where he or she shares "some common goal to violate the plaintiff's rights." *Betts v. Shearman*, 751 F.3d 78, 85 (2d Cir. 2014). "The inquiry is fact-specific," *Groman v. Twp. of*

[12] The conspiracy argument was also utter nonsense. The Complaint does not allege that the charts and spreadsheets *misattributed* to Ramnanan treatments or kickbacks that were made by a co-conspirator; it alleges that the State Defendants made up these treatments and kickbacks out of whole cloth to inflate Ramnanan's criminal exposure.

Manalapan, 47 F.3d 628, 638 (3d Cir. 1995), and rarely susceptible to resolution on a motion to dismiss. *Adickes v. S. H. Kress & Co*., 398 U.S. 144, 175 (1970) (Black, J., concurring) ("existence or nonexistence of a conspiracy" between private and state actors to violate someone's constitutional rights "is essentially a factual issue that the jury, not the trial judge, should decide").

There is no dispute that the Complaint adequately pled that Hayek and Awari cooperated with State Defendants by supplying the false, incriminating information that led to his indictment. However, the Superior Court held that Ramnanan pled himself out of a joint action claim by alleging that the State Defendants "pressured" Hayek and Awari into giving false statements by putting words into their mouths and asking improperly suggestive questions. Pa20. According to the court, this pressure negated any possible inference that Hayek and Awari were "willful participants" in the conspiracy to fabricate evidence or that they acted out of "self-interest." *Id.* at 20, 22. This finding is wrong in multiple respects.

First, it ignores the well-pled allegations of the Complaint and improperly draws inferences in Hayek and Awari's favor. The Complaint alleges that, after being apprehended and charged in a kickback scheme, Hayek and Awari entered into cooperation agreements to avoid jail time and preserve their licenses; that they effectively "joined the State Defendants' prosecution team, and became fully invested in their shared goal of manufacturing a case against as many doctors as

possible" to secure the benefit of the cooperation agreements, Pa32; that they dutifully repeated the false allegations that the State Defendants fed them during the proffer sessions; and that Hayek, in particular, participated over the course of several months in fabricating the various spreadsheets and charts that were eventually used to indict Ramnanan. Pa31-33, 39-41, 59-60, 63. The most plausible inference – and the one that the court was required to draw at the motion to dismiss stage – is that Hayek and Awari capitulated to the State Defendants' demands for incriminating information about Ramnanan for the same reason anyone joins a conspiracy: naked self-interest, specifically, a desire to receive a more favorable deal from prosecutors. That is sufficient to satisfy the willfulness requirement for a joint action claim. *See Betts v. Shearman*, 751 F3d 78, 86 (2d Cir. 2014) ("By jointly working to fabricate evidence of a crime, the private actors and the police officer shared the common goal of violating the Plaintiff's constitutional rights."); *Jennings v. Shuman*, 567 F.2d 1213, 1220 (3d Cir. 1977) (private party who made "false statements which provided a basis for the criminal process" acted under color of law).

The fact that the parties had different *reasons* for joining the conspiracy (the State Defendants to notch a high-profile conviction; Hayek and Awari to appease prosecutors) is of no moment. A conspiracy only requires a shared goal, not shared motivations. *See United States v. Maldonado-Rivera*, 922 F.2d 934, 963 (2d Cir. 1990) (the personal "goals of all the participants need not be congruent for a single

conspiracy to exist, so long as their goals are not at cross-purposes."); *United States v. Hitt*, 249 F.3d 1010, 1022 (D.C. Cir. 2001) ("the motivation of a single conspirator does not necessarily define the common goal of the conspiracy"); *United States v. Duff*, 76 F.3d 122, 127 (7th Cir. 1996) ("One can join a conspiracy to make money, even though others join it for different reasons. The question is whether the parties have agreed to advance a common goal.").

Second, the sort or pressure alleged in the Complaint does not remotely reach the threshold required to render Hayek and Awari non-willful participants *as a matter of law*. The voluntariness of a private person's accession to an official's demand is a fact-intensive inquiry that requires consideration of "the totality of the circumstances." *United States v. Antoon*, 933 F.2d 200, 203 (3d Cir. 1991). The key question is "whether the actor's free will has been overborne and his capacity for self-determination critically impaired." *Id*. Where the voluntariness inquiry is directed at statements provided to law enforcement, the totality of circumstances test requires courts to consider all the particulars of the interrogation, including its duration, what time of day it occurred, whether the witness was sleep deprived, whether the interrogators used improper deception or threats, and the degree of the witness's mental exhaustion. *See generally State v. Knight*, 183 N.J. 449, 463 (2005); *accord State v. Galloway*, 133 N.J. 631, 654 (1993) (listing factors courts must

consider and noting that "use of a psychologically-oriented technique during questioning is not inherently coercive").

The trial court failed to undertake this mandatory analysis, nor could it have done so without the benefit of discovery to determine, among other things, (i) the duration of the proffer sessions, (ii) Hayek and Awari's mental state and exhaustion levels during those sessions, (iii) whether the State Defendants used impermissible threats or cajolements to elicit the false testimony, (iv) the precise phrasing that the State Defendants used to encourage the false testimony, (v) whether Hayek and Awari resisted the entreaties for false information or whether they became enthusiastic participants in the conspiracy once they realized that doing so would maximize their prospects of securing leniency, and (vi) whether Hayek and Awari continued supplying false evidence against Ramnanan after the pressure subsided.

In fact, the sort of pressures alleged in the Complaint have never been deemed sufficient to render a defendant's cooperation involuntary. The sort of persistence that the Complaint alleges is par for the course during proffer sessions with reluctant cooperators. Cooperation agreements are coercive by design: they exist to compel a witness to testify about matters as to which he or she would rather remain silent. And it is hardly unusual for interrogators to demand evidence about specific individual and condition cooperation credit on the defendant complying. But courts have uniformly recognized that a defendant who cooperates to avoid a valid prosecution

is considered to have acted voluntarily. *Antoon*, 933 F.2d at 205-06 (recognizing that every person "who has done wrong and been caught" feels "pressure to cooperate" to minimize criminal exposure, but that cooperation will only be deemed involuntary where the state "overcomes [the person's] free will" by "threaten[ing] to do [something] illegal or inappropriate"); *see also United States v. Guarno*, 819 F.2d 28, 31 (2d Cir. 1987) ("A confession contained in a cooperation agreement is no less voluntary because the officers state, before they obtain the confession, that they will withdraw the offer of leniency if the suspect consults a lawyer."); *United States v. Horton*, 601 F.2d 319, 323 (7th Cir. 1979) (benefits of cooperation did not render involuntary an informant's consent to recording); *United States v. Snyder*, 428 F.2d 520, 522 (9th Cir. 1971) (cooperation "in the hope of escaping . . . punishment" is "not acting under the kind of coercion that the law condemns"); *United States v. Thomas*, 2004 U.S. Dist. LEXIS 26440, at *28 (S.D. Ind. Dec. 16, 2004) (every defendant faces "difficult choices" in deciding whether to accept a cooperation agreement, "but the difficulty of the choice does not render his ultimate decision any less voluntary").

Finally, this Court should reject the Superior Court's implicit holding that the standard prosecutorial tactics[13] alleged in the Complaint automatically shield private

[13] Ramnanan, of course, does not mean to suggest that it is standard and appropriate for prosecutors to suborn perjury. There is a crucial difference between the degree

persons from liability for conspiring with law enforcement to manufacture evidence. In most cases, the natural pressure cooperators feels to ingratiate themselves to prosecutors by inventing incriminating evidence is counterbalanced by the knowledge that, if discovered, they will lose the benefit of the plea and potentially face additional criminal penalties. Where, however, it is the *prosecutor* who is suborning the false testimony, every incentive aligns in favor fabricating evidence, save one: the risk of civil liability. The Superior Court's ruling, if upheld, would effectively eliminate that sole deterrent. This Court should not countenance such a result.

For these reasons, the finding that Hayek and Awari were not state actors for purposes of the CRA should be reversed.

V. THE COMPLAINT PLED THAT HAYEK AND AWARI'S FALSE STATEMENTS PROXIMATELY CAUSED THE PROSECUTION (Pa21-22)

To state a malicious prosecution claim, a plaintiff must plead that the defendant was the "'proximate and efficient cause of maliciously putting the law in motion.'" *Epperson v. Wal-Mart Stores, Inc.*, 373 N.J. Super. 522, 532 (Super. Ct. App. Div. 2004) (quoting *Seidel v. Greenberg*, 108 N.J. Super. 248, 258 (Law Div. 1969)). A plaintiff may show proximate and efficient causation by showing that the

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of coercion and the action the coercer seeks to elicit. The focus here is on the former because that is what determines whether the action was voluntarily undertaken.

defendant took "some active part in instigating or encouraging the prosecution or advis[ing] or assist[ing] another person to begin the proceeding, [or by] ratif[ying] it when it is begun in defendant's behalf, or [by] tak[ing] any active part in directing or aiding the conduct of the case." *Id.* at 531.

The Superior Court quoted *Seidel* "proximate and efficient cause" language but never made an explicit finding about proximate causation. To the extent the court meant to imply that the Complaint did not establish causation, it is in error: the Complaint explicitly pleads that the first indictment was brought based "entirely on the manufactured claims of Hayek," and that the sole evidence of the referral scheme referenced in the Superseding Indictment consisted of the statements supplied by Awari. Pa47, 63

VI. THE SUPERIOR COURT ERRED IN FINDING THAT HAYEK AND AWARI WERE ENTITLED TO TESTIMONIAL IMMUNITY (Pa22-23)

The Superior Court's finding that Hayek and Awari were entitled to absolute immunity under *Rehberg v. Paulk*, 566 U.S. 356 (2012), is flat wrong. *Rehberg* only recognized absolute immunity for witnesses who *testify* before a grand jury. *Id.* at 359. Hayek and Awari gave statements directly to law enforcement, but neither appeared before the grand jury.

It is well-established that statements made to investigators enjoy only a "qualified privilege." *Geyer*, 279 N.J. Super. at 391; *Dairy Stores, Inc. v. Sentinel*

Pub. Co., 104 N.J. 125, 137 (1986) ("our courts repeatedly concluded that only a qualified privilege should apply to statements made to police"). That privilege does not apply where the person making the statement "has full knowledge of its untruthfulness." *Geyer*, 279 N.J. Super. at 393 (citing cases); *id.* ("[W]e find no compelling policy interest in affording to untruthful criminal complainants an absolute privilege while affording to the prosecutors who receive and act upon such untruthful complaints only a qualified privilege."); *Afiriyie v. Bank of Am*., 2013 N.J. Super. Unpub. LEXIS 285, at *27-28 (Super. Ct. App. Div. Feb. 7, 2013) ("absolute privilege . . . does not protect against claims of malicious prosecution") (citing cases). The Complaint adequately pled that Hayek and Awari were aware that they were providing false testimony to law enforcement authorities. Pa32-33, 39-40, 60. That should mark the end of the immunity analysis.

The Superior Court appears to have accepted Hayek's position below that he enjoyed absolute immunity because "his proffer/deposition testimony was presented to the grand jury" by way of Detective Berg, thereby making Hayek a "witness in the grand jury proceeding." Hayek Br at 11. That position is triply flawed.

First, it is contrary to well-established law. Even where a witness ultimately testifies before the grand jury, he or she may still be held liable for earlier fabrications. As the Second Circuit explained, were it otherwise, any individual "could immunize . . . any unlawful conduct prior to and independent of his perjurious

grand jury appearance merely by testifying before a grand jury." *Coggins v. Buonora*, 776 F.3d 108, 113 (2d Cir. 2015). Allowing law enforcement that easy end-run is "inconsistent with the limitations *Rehberg* explicitly imposes on the scope of the absolute immunity, which the Supreme Court instructed was not to 'extend[] to all activity that a witness conducts outside of the grand jury room.'" *Id.* (quoting *Rehberg*, 566 U.S. at 370 n.1 (2012)).

Second, the extension of testimonial immunity to non-testifying witnesses is irreconcilable with the cost-benefit reasoning that underlay *Rehberg*. In deciding whether to embrace absolute immunity, the Court weighed the need for a deterrent against perjury versus the risk that civil liability would chill witnesses and "deprive the tribunal of critical evidence." *Rehberg*, 566 U.S. at 367. The Court determined that the balance favored absolute immunity because the threat of a perjury prosecution was a sufficient deterrent. *Id*. That deterrent, however, is lacking in cases such as this where the mendacious witness never provides testimony under oath, cannot be prosecuted for perjury, and faces none of the repercussions a cooperating defendant normally risks for lying to law enforcement. In such circumstances, the threat of civil liability is the only deterrent against cooperating with investigators to fabricate evidence.

Third, the radical expansion of absolute immunity that the Superior Court's order implies would eviscerate most fabrication of evidence and malicious

prosecution claims, and arbitrarily so. Under Hayek's theory, these claims are only available where a prosecutor decides – for whatever reason, with or without communicating his or her intent to the witness – to withhold the dissembling witness's falsities from the grand jury, and secures an indictment nonetheless. But where a jury indicts without even hearing the false evidence, it will be well-nigh impossible to establish that this evidence was a proximate cause of prosecution (as is required for a fabrication of evidence claim) or that probable cause was lacking to indict (as is required for a malicious prosecution claim).

Finally, even if the Court expanded the doctrine and treated Hayek and Awari as testifying witnesses for purposes of *Rehberg*, it still would not entitle them to absolute immunity for a simple reason: New Jersey courts have only adopted *Rehberg*'s rule of absolute immunity to grand jury witnesses who are "alleged to have omitted testimony" – not to individuals, like Hayek and Awari, who provide "false testimony." *Cruz*, 466 N.J. Super. at 10.

VII. THE SUPERIOR COURT ERRED IN FINDING THAT THE IIED CLAIM WAS UNTIMELY (Pa18-19, Pa23-24)

Ramnanan's IIED claim is subject to a two-year statute of limitations. N.J.S.A. 2A:59-8(b); N.J.S.A. 2A:14-2. According to the Superior Court, Ramnanan's IIED claim accrued "in 2017" when his "criminal defense counsel told the State Defendants . . . that the various documents proffered were fabricated," or – at the latest – in May 2018 when the Superseding Indictment was filed. Pa18.

Either way, because the Complaint was filed in September 2020, 28 months after the Superseding Indictment, the court concluded that his IIED claim was time-barred. This finding was in error for two separate reasons.

First, the court applied the wrong accrual rule. Ramnanan's IIED claim was predicated on the creation of fabricated evidence to initiate and maintain a baseless prosecution.[14] As such, it did not accrue until there was a "favorable termination" of the criminal proceedings – *i.e.,* until the May 23, 2019 order dismissing the indictment. *McDonough v. Smith*, 139 S. Ct. 2149, 2156-57 (2019) (claims that are "analogous" to malicious prosecution are subject the delayed accrual rule).

The Superior Court declared, without supplying any reasoning, that it was "not persuaded" that *McDonough* applied to IIED claims. Every other court to consider the issue has reached the opposite conclusion. *See, e.g., Kelley v. Reyes*, 2020 U.S. Dist. LEXIS 114921, at *20-21 (D.N.J. July 1, 2020) (*McDonough* applies to IIED claims brought under the CRA that are based on fabrication of evidence); *accord Manansingh v. United States*, 2023 U.S. App. LEXIS 7320, at *5 (9th Cir. Mar. 28, 2023); *Wilson v. Est. of Burge*, 667 F. Supp. 3d 785, 828-29 (N.D. Ill. 2023)

[14] There is no dispute that malicious prosecution and the fabrication of evidence can be the basis for an IIED claim. *See, e.g., Kelley*, 2020 U.S. Dist. LEXIS 114921, at *27-28 ("Fabricating evidence and causing false legal process is a basis for an IIED claim."); *accord Hill v. NJ Dep't of Corr. Com'r Fauver*, 342 N.J. Super. 273, 297 (App. Div. 2001); *R.K. v. Y.A.L.E. Schs., Inc.*, 621 F.Supp. 2d 188, 199 (D.N.J. 2008).

(citing cases). Indeed, there is no principled reason that *McDonough* would not apply. *McDonough* instructed courts to look past labels and consider "practical considerations" when affixing an accrual date. 139 S. Ct. at 2155. In particular, the Court cautioned that an accrual rule that required criminal defendants to initiate civil lawsuits before the termination of criminal proceedings would spur "parallel criminal and civil litigation over the same subject matter" and potentially give rise to "conflicting civil and criminal judgments." *Id*. at 2155, 2157. It continued:

> A significant number of criminal defendants could face an untenable choice between (1) letting their claims expire and (2) filing a civil suit against the very person who is in the midst of prosecuting them. The first option is obviously undesirable, but from a criminal defendant's perspective the latter course, too, is fraught with peril: He risks tipping his hand as to his defense strategy, undermining his privilege against self-incrimination, and taking on discovery obligations not required in the criminal context.
>
> [*Id.* at 2158.]

These "pragmatic concerns" are equally present where, as here, a fabrication of evidence claim is fashioned as an IIED cause of action. *Id.* at 2157.

Independent of *McDonough*, the Superior Court erred by misapplying the discovery rule. Under New Jersey law, a claim accrues not when the wrong is committed, but "when a plaintiff knows or, through the exercise of reasonable diligence, should know of the basis for a cause of action against an *identifiable* defendant." *The Palisades at Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC*, 230 N.J. 427, 447 (2017) (emphasis added); *Ben Elazar v. Macrietta Cleaners, Inc*.,

230 N.J. 123, 134-35 (2017). An IIED claim requires a showing that defendants acted "intentionally or recklessly" and that their conduct was "extreme and outrageous." *Hill*, 342 N.J. Super. at 297. In other words, Ramnanan's IIED claim could not have accrued until he had constructive knowledge of each Defendant's involvement in the deliberate falsification of evidence.

There is no indication that Ramnanan knew or should have known this to September 2018. The Superior Court based its timeliness finding entirely on the Complaint's allegation that Ramnanan's attorney challenged the accuracy of the Kickback Spreadsheet prior to his indictment. Pa41. But there is an obvious difference between discovering inaccuracies in the State's evidence and divining that those inaccuracies are the product of a conspiracy to manufacture evidence by each of these Defendants. Ramnanan had no cause to believe that the errors in the Spreadsheet were deliberate, as opposed to being the product of a misunderstanding, or the product of prosecutors' credulous-but-good-faith reliance on mistaken testimony. A criminal defendant cannot and should not be expected to reflexively assume that every inaccurate piece of inculpatory evidence is the product of prosecutorial misconduct. Legally, such an expectation flies in the face of the well-established presumption that prosecutors act in good faith. *See State v. Perry*, 124 N.J. 128, 167 (1991). Practically, it would encourage criminal defendants to sprint

to the courthouse with placeholder IIED lawsuits at the first hint of error in the State's evidence, lest they risk losing their claims to a statute of limitations defense.

Finally, the Superior Court's fixation on the Kickback Spreadsheet obscures the fact that this was but one of several fabrications, each of which constitutes an independent basis for Ramnanan's IIED claim. The court ignored what was arguably the single most devastating fabrication: the falsified Insurance Billing Chart, which was used to charge him with fraud and satisfy the $75,000 threshold required to charge second-degree offenses. There is zero indication that Ramnanan knew prior to September 2018 that this Chart was instrumental in securing his indictment or that it willfully misrepresented that the insurance companies considered the payment of referral fees "material" when deciding whether to pay a claim.

For these reasons, the Court should reverse the finding that Ramnanan's IIED claims are time-barred.

CONCLUSION

For the foregoing reasons, the order below should be reversed in its entirety.

Dated: July 15, 2024

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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DR. TERRY RAMNANAN,

Plaintiff-Appellant,

v.

COLIN KEIFFER, ESQ., Individually, DETECTIVE WENDY BERG, Individually, DETECTIVE GRACE PROETTA, Individually, DETECTIVE JOHN CAMPANELLA, Individually, RONALD HAYEK, D.C., Individually, UNION WELLNESS CENTER PA LLC, ADAM AWARI, D.C., Individually, and ADVANCED CHIRO SPINE CENTER, P.C.,

Defendants-Appellants.

Civil Action
Docket No. A-002578-23T4

On Appeal from:

SUPERIOR COURT OF NEW JERSEY, LAW DIVISION, BERGEN COUNTY
DOCKET NO BER-L-2146-23

Sat below:
Hon. Mary F. Thurber, J.S.C.

BRIEF AND APPENDIX ON BEHALF DEFENDANTS-RESPONDENTS, RONALD HAYEK, D.C. AND UNION WELLNESS CENTER PA, LLC

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PRELIMINARY STATEMENT

The Respondents, Ronald Hayek and Union Wellness Center P.A., LLC (collectively "Hayek"), submit this Brief in opposition to the Appellant, Dr. Terry Ramnanan's, Appeal.

This being the Appellant's Fourth Bite at the Apple, the Appellant should once again be thwarted in his attempt to assert civil rights violation claims against Hayek as his complaint continues to allege that Hayek was coerced and pressured by the State Defendants, and thus, with those allegations, Hayek cannot be deemed a "state actor" liable for civil rights violations as he was not a willful participant in the State Defendants' action taken against the Appellant.

In his first attempt, the Appellant's Amended Complaint filed in the United States District Court of New Jersey against Hayek and the other Defendants was dismissed. In his second attempt, the Appellant filed a Second Amended Complaint in the United States District Court of New Jersey against Hayek and the other Defendants, which was also dismissed. While the Federal Court declined to exercise supplemental jurisdiction over the state court claims, the Federal Court did dismiss the 42 USC 1983 claims ("1983 Civil Rights Claims") concluding that that Hayek, as a private citizen, could not be not liable as a state actor under the 1983 Civil Rights claims, as the allegations that he was coerced into giving the

statements complained of evince that he was not a willful participant in the state action taken against the Appellant.

Rather than appeal those Federal Court dismissals, the Appellant took his third bite at the apple against Hayek by filing the within action in the Superior Court of New Jersey, Bergen County in which he still set forth the same allegations against Hayek that were made in the Federal Court but only removed the 1983 Civil Rights Claims. In this regard, the Appellant continues to assert that that Hayek was coerced and pressured into giving the alleged false testimony. As a result, the Honorable Mary F. Thurber, J.S.C dismissed the New Jersey Civil Rights claims asserted under N.J.S.A. 6:10-1 ("NJCRA claims") as the allegations of coercion are inconsistent with the NJCRA clams.

Further, based on immunity, Judge Thurber correctly dismissed the NJCRA claims and the Intentional Infliction of Emotional Distress claim (the "IIED claim") asserted against Hayek.

Also, Judge Thurber correctly dismissed the IIED claim against Hayek as being time barred under the statute of limitations.

PROCEDURAL HISTORY

On or about April 1, 2016, Hayek, as a witness, gave testimony under oath in a deposition/proffer session. (Pa32).

On or about August 1, 2017, the Appellant was indicted for claims relating to payments made by the Appellant to Hayek. (Pa31 and Pa47).

On or about May 31, 2018, a superseding indictment was issued against the Appellant for claims relating to payments made by the Appellant to Hayek. (Pa57)

On May 23, 2019, Judge Vinci of the Superior Court of New Jersey dismissed the charges against the Appellant. (Pa30)

On October 7, 2020, the Appellant filed a Federal Amended Complaint in the United States Court District of New Jersey against Hayek and others. (Pa80)

On June 30, 2021, the Court granted Hayek's Motion to Dismiss the Federal Amended Complaint, concluding that the Federal Amended Complaint failed to assert any plausible 42 USC 1983 claims, and declining to exercise supplemental jurisdiction over the remaining state claw claims. (Da5) As to the 42 USC 1983 claims, the Opinion held that the Federal Amended Complaint alleged that Hayek was coerced into giving the statements complained of and as a result, Hayek, as a private citizen, was not liable as a state actor under a 42 USC 1983 claim, since he was not a willful participant in the state action.

On September 13, 2021, the Appellant filed a Federal Second Amended Complaint in the United States Court District of New Jersey against Hayek and others. (Pa161).

On March 28, 2023, the United States District Court of New Jersey granted the Hayek's Motion to Dismiss the Federal Second Amended Complaint and dismissed the state law claims against Hayek without prejudice, since the Court declined to exercise supplemental jurisdiction over the state law claims asserted against Hayek. (Da35)

On April 24, 2023, the Appellant filed a Complaint against Hayek in the Superior Court of New Jersey, Bergen County (Pa25). The State Court Complaint asserts the following causes of action against Hayek:

1. A NJCRA claim that Hayek violated Plaintiff's civil rights under the New Jersey Constitution for fabricating evidence (Count 1)
2. A NJCRA claim that Hayek violated Plaintiff's civil rights under the New Jersey Constitution for maliciously prosecuting the Plaintiff (Count 2)
3. A NJCRA claim that Hayek violated Plaintiff's civil rights under the New Jersey Constitution for participating in a Conspiracy (Count 4)
4. An Intentional Infliction of Emotional Distress Claim (Count 5)

On July 7, 2023, Hayek filed a Motion to Dismiss the State Court Complaint (Da1)

On March 29, 2024. The Honorable Mary. F. Thurber, J.S.C. entered an order dismissing the claims asserted against Hayek.

STATEMENT OF FACTS

Appellant is a physician. Hayek was a licensed chiropractor that operated his business through Union Wellness. (Pa27)

As of March 2016, the Appellant was aware that Hayek was under criminal investigation and wanted no further involvement with Hayek (Pa35).

On or about April 1, 2016, Hayek, as a witness, gave testimony under oath in a deposition/proffer session, with Defendant, Detective Colin Keiffer, and other members of the New Jersey Attorney General's Office of the Insurance Prosecutor. Therein, Hayek testified that the Appellant paid him referral fees for referring patients to the Appellant for EMG and NCV tests. (Pa35)

In a November 1, 2016 meeting, the Detective told Appellant and his counsel that he wanted the Appellant to disclose everything he knew about the Hayek kickback scheme (which scheme is defined in the State Complaint as alleged payments being made by Appellant to Hayek for the referral of patients) (Pa37).

During the November 1, 2016 meeting, the Detective gave Appellant's counsel a kickback spreadsheet showing all of Appellant's kickback payments to Hayek that were based allegedly on Hayek's records. (Pa39)

On November 8, 2016, Appellant's counsel told the detective that the Hayek kickback spreadsheet contained blatant fabricated evidence (Pa41).

On August 1, 2017, the Appellant was indicted for claims relating to payments made by the Appellant to Hayek. (Pa47)

On or about May 31, 2018, a superseding indictment was issued against the Plaintiff for claims relating to payments made by the Plaintiff to Hayek. (Pa57)

In securing the indictment, the State presented the statements made by Hayek in his proffer/deposition testimony, as well as a transcript of a recorded conversation between Hayek and the Appellant. (Pa231)

On May 23, 2019, Judge Vinci dismissed the criminal charges against the Appellant. (Pa64) The basis for the dismissal was wholly unrelated to Hayek's proffer testimony. While Judge Vinci found that the State did not fairly present its case to the grand jury, his Honor made such a ruling concluding that:

(a) the State improperly suggested to the grand jury that there was substantial caselaw in the civil context that insurance companies rely upon

(b) the State should have told the grand jurors that there was no law supporting a claim for healthcare insurance fraud, use of criminal runners or theft by deception

(c) the Supreme Court in the Escobar case did not take the position presented by the State in the grand jury proceeding

LEGAL ARGUMENT

POINT I: THE COURT CORRECTLY DISMISSED THE NJCRA CLAIMS AS HAYEK CANNOT BE CONSIDERED A STATE ACTOR THAT WAS A WILLFUL PARTICIPANT, AS THE COMPLAINT ALLEGES HE WAS COERCED INTO GIVING FALSE TESTIMONY.

In the State Court Complaint, the Appellant asserts claims under NJCRA that the Respondents violated Appellant's civil rights under the New Jersey Constitution for fabricating evidence (Count 1), maliciously prosecuting the Plaintiff (Count 2) and Conspiracy (Count 4).

NJCRA is modeled after the Federal Civil Rights Act, 42 U.S.C. § 1983 ("Section 1983"), and affords "a remedy for the violation of substantive rights found in our State Constitution and laws." Brown v. State, 442 N.J. Super. 406, 425 (App. Div. 2015), rev'd on other grounds, 230 N.J. 84 (2017) (quoting Tumpson v. Farina, 218 N.J. 450, 474 (2014)). The NJCRA has been interpreted by the New Jersey Supreme Court to be analogous to Section 1983; Thus, New Jersey courts "look to federal jurisprudence construing [Section 1983] to formulate a workable standard for identifying a substantive right under the NJCRA" Harz v. Borough of Spring Lake, 234 N.J. 317, 330 (2018).

Here, in the Unites States District Court of New Jersey action, the Federal Judge dismissed the Section 1983 claims because the Federal Court held that "To

state a claim under § 1983, a plaintiff must allege the violation of a right secured by the Constitution and laws of the United States, and must show that the alleged deprivation was committed by **a person acting under color of state law**." West v. Atkins, 487 U.S. 42, 48 (1988). "The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.' " *Id.* at 49 (quoting United States v. Classic, 313 U.S. 299, 326 (1941)). Private individuals, however, "may nonetheless be liable under § 1983 if they have conspired with or engaged in joint activity with state actors." Mikhaeil v. Santos, 646 F. App'x 158, 162 (2016) (citing Dennis v. Sparks, 449 U.S. 24, 27–28 (1980)).

Under the "joint action" test in order for a private citizen to be considered a state actor and be exposed to liability under a 1983 claim, **the private citizen had to be a WILLFUL PARTCIPANT** in a joint action with the State or its agents Surina v. S. River Board of Ed., 2018 WL 1327111, at 4, (DNJ March 15, 2018) (*quoting* Cahill v. Live Nation, 512 F. App'x 227, 230 (3rd Cir. 2013), citing Cruz v. Donnelly, 727 F. 2d 79, 80 (3rd Cir. 1984). (Da79) Moreover, the Federal Court's Opinion noted that a private citizen does not become liable as a state actor under 42 USC 1983, when a detective does not allow a private citizen to freely

speak the truth, **but rather coerces the private citizen to give a statement.** citing to Stokes v. Eldred, 2021 WL 2103256 at 4 (DNJ May 25, 2011) (Da68). [1]

Also, the Federal Court Opinion noted that the Amended Complaint was "replete with factual **allegations that the State Defendants COERCED Hayek to give false misleading and dishonest testimony**" and that the Federal Amended Complaint asserted that it was only after Hayek was threatened, harassed, intimidated, bribed and coerced that they finally identified the Appellant in a kickback scheme. As a result, the Federal Court concluded that Hayek was not a state actor subject to liability under 42 USC 1983 claims, because the Federal Amended Complaint alleged he was coerced into giving the statements complained of.

In the State Court Complaint, the Appellant's allegations under the NJCRA claims are the same allegations against Hayek that were made in the Federal Second Amended Complaint's 42 USC 1983 claims. In this regard, the Appellant continues to assert that that Hayek was coerced into giving the alleged false testimony as follows:

(a) Hayek was "induced" to name as many doctors as possible in the kickback scheme .... By dangling the possibility of no jail sentence and the

[1] The Opinion also provides that "the color of state law" element is a threshold issue and there is no liability under 42 USC 1983 claims for those not acting under the color of law. Groman v. Township of Manalapan, 47 F. 3d. 628,638 (3rd Cir. 1995)

opportunity to keep his license (see the State Court Complaint ¶44 and the Federal Second Amended Complaint. ¶37);

(b) at the end of his long proffer session, **after being relentlessly pressured by the State** Defendant to name other Doctors …. Hayek finally made his allegations against the Appellant (see the State Court Complaint ¶54 and the Federal Second Amended Complaint. ¶45,);

(c) the State Defendants **suborned** perjury from Hayek (see the State Court Complaint ¶328 and the Federal Second Amended Complaint. ¶328)

(d) during the Investigative State, the **State Defendants** created false misleading and dishonest evidence by **suborning** perjury from Hayek. (see the State Court Complaint ¶340 and the Federal Second Amended Complaint. ¶346,)

(f) the **State Defendants** manipulated the truth by **suborning** perjury from Hayek. (see the State Court Complaint ¶340 see Federal Second Amended Complaint. ¶328 , ¶346 and ¶350,).

As a result, the State Court correctly held that the NJCRA claims should be dismissed, since based on the allegations of the Complaint, the Respondents cannot be found to be a willful participant in a joint action with the State or its agents, and thus, cannot be liable under NJCRA.

Nonetheless, the Appellant argues that the characterization of Hayek providing testimony in the hopes of receiving a lesser sentence, is not coercion to

render his cooperation involuntary. However, **none of the cases cited for this proposition are applicable to a determination of whether a person was a willful participant to be deemed a state actor** under a 42 USC 1983 claim or a NJCRA claim.

As to the Appellant's argument that pursuant to Betts v. Shearman, 751 F.3d 78, 85 (2d Cir. 2014), a private party will be deemed a willful participant in a joint action where he or she shares "some common goal to violate the plaintiff's rights.". This was not the holding. Rather, it was held that "a private actor **can only be** a willful participant in a joint action where he or she shares some common goal to violate the plaintiff's rights." Hence, where the private actor shares a common goal with the police, the private actor is **NOT** deemed (**NOR** automatically becomes) a willful participant for determining liability on 1983 claims, instead, the private actor **can be deemed willful participant.** Further, this case is not applicable as it does not concern the willfulness of the private actor where the alleged private actor was coerced or pressured into giving certain alleged false testimony.

As to the Appellant's argument that pursuant to Jennings v. Shuman, 567 F.2d 1213, 1220 (3d Cir. 1977), a private party who made "false statements which provided a basis for the criminal process" acted under color of law. However, this

holding does not apply as it does not involve the situation where the private actor was coerced or pressured into giving certain alleged false testimony.

As to the Appellant's argument that pursuant to United States v. Antoon, 933 F.2d 200, 205 (3d Cir. 1991), the voluntariness of a private person's accession to an official's demand is a fact-intensive inquiry that requires consideration of "the totality of the circumstances" to determine "whether the actor's free will has been overborne and his capacity for self-determination critically impaired." . However, this holding does not apply as it deals with consent to wear a recording device.

In Antoon, the Doctor Defendant was charged with writing phony prescriptions for pills which he had his paramedic friend fill and then return the pills to the Doctor Defendant. After signing a voluntary consent form, the paramedic wore a wire and recorded an incriminating conversation with the Doctor Defendant. Since a wiretap order requires the consent of one of the parties, the Doctor Defendant moved to suppress the recording claiming that the paramedic's consent was not voluntary claiming the paramedic was facing the consequences of being charged if he did not cooperate and wear the recording device. The Third Circuit disagreed and found that the paramedic's consent to wear the recording device was voluntary, because the paramedic was not threatened to do something that was illegal or inappropriate. Here, we are not dealing with consent to a

recording device, but rather this case involves whether Hayek as a private citizen is a state actor liable under a 1983 or NJCRA claim. **Thus, the Antoon case had nothing to do with a 42 USC 1983 claim or a NJCRA claim.**

Pursuant to State v. Knight, 183 N.J. 449, 463 (2005) and State v. Galloway, 133 N.J. 631, 654 (1993), the Appellant argues that where the voluntariness inquiry is directed at statements provided to law enforcement, the totality of circumstances test requires courts to consider all the particulars of the interrogation, including its duration, what time of day it occurred, whether the witness was sleep deprived, whether the interrogators used improper deception or threats, and the degree of the witness's mental exhaustion. However, these cases involved analyzing whether confessions of guilt were voluntarily made and thus, are not applicable as they do not address the willfulness of a private actor in the context of a **42 USC 1983 claim or a NJCRA claim.**

As to the Appellant's citation to United States v. Snyder, 428 F.2d 520, 522 (9th Cir. 1971) for the proposition that "in the hope of escaping . . . punishment" is "not acting under the kind of coercion that the law condemns", this case is also not applicable. In this regard, Snyder involved a Defendant being prosecuted for perjury concerning his grand jury testimony. The Defendant lied in his grand jury testimony concerning a case of playing card cheating at the "Friars Club", but upon receiving immunity he re-testified before the grand jury telling the truth.

Thereafter, the Federal Government subpoenaed the Defendant to testify in other cases involving the playing card cheating scandal, but he refused to appear. As a result, Snyder was indicted and charged with lying before the grand jury and other charges relating to the scandal. Thereafter, he filed a Motion to Strike and Suppress the statements he made to the grand jury in the second go around contending he was coerced by the government in to making them. The Judge denied the Motion as it concluded that the first grand jury testimony is what was perjurious and the perjury laws are always a 'threat' to those who choose to perjure themselves and serve two purposes. First, it is designed to forestall perjury, by reminding those who are called to testify that the oath that they take is not an idle formality. Second, by providing for punishment for those who violate the oath, it seeks to deter similar conduct by others. When a witness does what Snyder did, he makes himself liable to that punishment. This is a 'coercion' established by law. When Snyder agreed to tell the truth, in the hope of escaping that punishment, he was not acting under the kind of coercion that the law condemns. **Thus, the Snyder case had nothing to do with a 42 USC 1983 claim or a NJCRA claim**

POINT II: THE COURT CORRECTLY DISMISSED THE CLAIMS AGAINST HAYEK DUE TO IMMUNITY.

A witness in a grand jury proceeding is entitled to the same absolute immunity from suit under 42 USC 1983[2] as a witness who testifies at trial. Rehberg v. Paulk, 566 U.S. 356 (2012). Here, while Hayek did not testify at the grand jury proceeding, in effect he was a witness in the grand jury proceeding as his proffer/deposition testimony was presented to the grand jury as well as a transcript of his recorded conversation with the Appellant. As a result, even if the Court were to conclude that Hayek was a private actor liable for a NJCRA claim, Hayek and Union Wellness are immune from the State Court Complaint's claims pursuant to Rehberg.[3]

In opposition to Rehberg, the Appellant argues that pursuant to Coggins v. Buonora, 776 F.3d 108, 113 (2d Cir. 2015), when a witness ultimately testifies before the grand jury, he or she may still be held liable for earlier fabrications, since to rule otherwise, any individual "could immunize . . . any unlawful conduct

[2] As set forth above. The NJCRA has uniformly interpreted in parallel with Section 1983 and read the two as coextensive. As a result, the same immunity granted to grand jury witnesses from 42 USC 1983 claims should be afforded to NJCRA claims.

[3] It is to be noted that there are no factual allegations in the Amended Complaint concerning actions taken by Union Wellness. Rather, the Amended Complaint solely alleges actions taken by Hayek in his personal capacity.

prior to and independent of his perjurious grand jury appearance merely by testifying before a grand jury." However, Coggins is not applicable. There, the Defendant was a police officer that conceded he provided false information on a police report, failed to complete an incident report concerning the chase and arrest of the Plaintiff, failed to provide the proper paperwork that was required by policy, falsified official documents.

As a result, the Coggins court was determining whether a police officer could be granted immunity from a 1983 claim for actions that occurred outside of the grand jury testimony. In this regard, the Coggins court held when a police officer claims absolute immunity for his grand jury testimony under Rehberg, the court should determine whether the plaintiff can make out the elements of his 1983 claim without resorting to the grand jury testimony. If the claim exists independently of the grand jury testimony, it is not "based on" that testimony, as that term is used in Rehberg. Conversely, if the claim requires the grand jury testimony, the defendant enjoys absolute immunity under Rehberg. Coggins at 113.

Here, the claims against the Respondents do not exist without Hayek's proffer/deposition testimony that was presented to the grand jury. Thus, Coggins does not apply.

POINT III: THE COURT CORRECTLY HELD THAT THE INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS CLAIM IS TIME BARRED.

The Intentional Infliction of Emotional Distress Claim (an "IIED" claim) is a personal injury claim that has a two year statute of limitations. N.J.S.A. 2A:14–2. The two-year limitations period begins to run on an IIED claim when the distress occurred. Fraser v. Bovino, 317 N.J. Super. 23, 34 (App. Div. 1998). Further, when a Plaintiff is alleging an IIED claim arising from an arrest, then those claims began to run on the date the Plaintiff was arrested. Lloyd v. Ocean Twp. Council, 2019 WL 4143325, (D.N.J. Aug. 31, 2019), aff'd sub nom. Lloyd v. Ocean Twp. Couns., 2021 WL 1608553 (3d Cir. Apr. 26, 2021) (Da56 and Da64); Campanello v. Port Auth. of N.Y. & N.J., 590 F. Supp. 2d 694, 699-700 (D.N.J. 2008) (finding that claims for negligent and intentional infliction of emotional distress accrued on the date of arrest).

Here, on August 2, 2017, the Appellant was indicted for claims relating to payments made by the Appellant to Hayek. As a result, the claims against Respondents for intentional infliction of emotional distress began to accrue on August 2, 2017. However, on September 16, 2020, the Appellant filed the Federal Action and on September 13, 2021, the Appellant filed the State Action.

As a result, the intentional infliction of emotional distress claim against the Respondents was correctly barred by the statute of limitations.

The Appellant argues that the Court erred in barring the IIED claim under the Statute of Limitations as he contends that pursuant to Mc Donough v. Smith, 139 S.Ct. 2149 (2019), an IIED claim does not accrue until there is a favorable termination of the criminal action. However, McDonough did not involve an IIED claim **nor held that** IIED claims do not accrue until the favorable termination of a criminal proceeding. Rather, McDonough involved 1983 claims involving fabrication of evidence.

Here, it is to be noted that Judge Thurber ruled that that the Appellant's 1983 claims for malicious prosecution and fabrication of evidence were **not** time barred by the statute of limitations due to McDonough as the 1983 claims did not accrue until the termination of the Appellant's criminal proceedings. However, Judge Thurber correctly declined to extend the McDonough holding that 1983 claims do not accrue until a favorable termination of a criminal proceeding to the common law IIED claim. In this regard, a 1983 claim and/or NJCRA claim involves the taking away of Plaintiff's civil rights. As such, a 1983 claim should not accrue until it is determined that Plaintiff's civil rights were wrongfully taken away (obviously, if the criminal action results in a conviction then the Plaintiff's civil rights were not wrongly impacted). Conversely, on an IIED claim, the impact

of the Plaintiff's civil rights is not an element of an IIED claim. Thus, the McDonough holding should not apply to the Appellant's IIED claim.

As to the Appellant's argument that pursuant to Kelley v. Reyes, 2020 U.S. Dist. LEXIS 114921, at 20-21 (D.N.J. July 1, 2020); Manansingh v. United States, 2023 U.S. App. LEXIS 7320, at 5 (9th Cir. Mar. 28, 2023); Wilson v. Est. of Burge, 667 F. Supp. 3d 785, 828-29 (N.D. Ill. 2023), other courts have held that McDonough applies to IIED claims, this is not true.

As to Mananssingh, this case is not binding or precedential as it is a 9th Circuit case and the opinion itself states it is not precedential . Further, the Manansingh case is completely distinguishable as it involves an IIED claim brought under the Federal Tort Claim Act against the government and the ruling opined that an IIED claim under the FTCA can't be brought against the government until the criminal case was dismissed. Here, the common law IIED claim could have been brought by the Appellant against the Respondents when he was indicted suffering the alleged emotional distress as the Appellant was not bound to wait under the restrictions of a FTCA claim.

As to Kelley, that case involved the wrongful conduct by police officers that resulted in the wrongful conviction of murder against the Plaintiff. The Defendant, police officers withheld exculpatory information (e.g. that an eye witness who viewed the Plaintiff in a lineup told the police that the Plaintiff was not the person

who saw committed the murder), threatened violence and punched the Plaintiff in order to get the Plaintiff to confess to the murder, and included details in the written confession that were only known to the police and were consistent with their incorrect theory of the case. Since the police officer's actions pertained to a wrongful conviction, the Court held that the IIED claim did not accrue until the convictions were overturned. Here, the Appellant did not need the indictment to be dismissed to pursue his claim against the Respondents as the Respondents as private citizens were not convicting the Appellant.

As to the Wilson case, this case is not binding or precedential as it is a District of Illinois case and the opinion itself states it is not precedential. The case involved allegations of wrongful convictions actions taken by the Police Defendants' including (a) the torturing the Plaintiff to obtain a confession, (b) fabricating the confession, and (c) fabricating, coercing, and suppressing other false evidence. The Court applied the delayed accrual rule, because the IIED claim involved attacking of the validity of the plaintiffs' convictions. Here, the Appellant did not need the indictment to be dismissed to pursue his claim against the Respondents as the Respondents as private citizens were not convicting the Appellant.

Next, the Appellant contends that the IIED claim accrues not when the wrong is committed, but "when a plaintiff knows or, through the exercise of

reasonable diligence, should know of the basis for a cause of action against an identifiable defendant." The Palisades at Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC, 230 N.J. 427, 447 (2017). Under this discovery rule, the Appellant argues that there is no indication that the Appellant prior to September 2018 knew or should have known about the Respondents' alleged falsification of evidence.

However, the charges set forth in the indictment involved illegal kickback payments made by the Appellant to Hayek (See Par. 141 and 142 of the State Complaint, Pa 25). Further, prior to the August 2, 2017 indictment, the following allegations made in the Complaint evidence that the Appellant knew or should have known that Hayek's alleged IIED conduct:

(a) As of March 2016, the Appellant was aware that Hayek was under criminal investigation and wanted no further involvement with Hayek (See Par. 64 and 65 of the State Complaint, Pa25)

(b) In a November 1, 2016 meeting, the Detective told Appellant and his counsel that he wanted the Appellant to disclose everything he knew about the Hayek kickback scheme (which scheme is defined in the State Complaint as alleged payments being made by Appellant to Hayek for the referral of patients) (See Par. 78 and 81 of the State Complaint, Pa25)

(c) During the November 1, 2016 meeting, the Detective gave Appellant's counsel a kickback spreadsheet showing all of Appellant's kickback payments to Hayek that were based allegedly on Hayek's record. (See Par. 90 of the State Complaint, Pa25)

(d) On November 8, 2016, Appellant's counsel told the detective that the Hayek kickback spreadsheet contained blatant fabricated evidence (See Par. 101 of the State Complaint, Pa25)

Also, after being indicted on August 2, 2017, the Appellant (or his counsel) had the right to discovery including the transcripts of Hayek's proffer sessions.[4]

As a result, based on the allegations of the State Complaint, the Appellant knew or should have known of Hayek's alleged IIED conduct more than two years before the filing of the IIED claim against Hayek.

To the extent that Appellant is arguing that he did not know of Hayek's alleged IIED conduct more than two years before the filing of the IIED claim, the Appellant did not provide a certification to support that position.

"Under the [discovery] rule, a claim does not accrue until the plaintiff 'discovers, or by an exercise of reasonable diligence and intelligence should have discovered that he [or she] may have a basis for an actionable claim.'" Catena v.

[4] It is to be noted that on May 31, 2018 a second indictment was issued against the Plaintiff adding additional charges. Between the first and second indictment, the Plaintiff would have received the State's discovery including Hayek's proffers.

Raytheon, 447 N.J. Super. 43 (App. Div. 2016) (quoting Lopez v. Swyer, 62 N.J. 267 (1973)). But "the party seeking the rule's benefit bears the burden to establish it applies." Catena at 53 (citing Lopez, 62 N.J. at 276). Here, the Appellant has not met his burden to set forth proof that he did not know of the Hayek's alleged IIED conduct more than two years before the filing of the IIED claim and a statement by Counsel in a brief is hearsay.[5]

[5] A Lopez hearing is only required when the facts concerning the date of the discovery are in dispute." (quoting Henry v. N.J. Dep't of Hum. Servs., 204 N.J. 320, 336 n.6 (2010). Here, without a certification from Appellant, there are no facts in dispute entitling Appellant to a Lopez hearing.

CONCLUSION

As a result of the foregoing, the Decision by Judge Thurber dismissing the claims asserted against Hayek should be affirmed.

Respectfully submitted,

BRAY & BRAY, L.L.C.
Attorneys for Defendants,
Ronald Hayek and Union Wellness Center PA,LLC

By: /s/Geoffrey T. Bray
GEOFFREY T. BRAY

DATED: August 22, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

Dr. Terry Ramnanan, **Plaintiff,** **v.** **Colin Keiffer, Esq., Individually, Detective Wendy Berg, Individually, Detective Grace Proetta, Individually, Detective John Campanella, Individually, Ronald Hayek, D.C., Individually, Union Wellness Center PA LLC, Adam Awari, D.C., Individually, and Advanced Chiro Spine Center, P.C.,** **Defendants.**	:	**CIVIL ACTION** **DOCKET NO. A-002578-23T4** **ON APPEAL FROM** **SUPERIOR COURT OF NEW JERSEY** **LAW DIVISION, BERGEN COUNTY** **DOCKET NO. BER-L-2146-23** **Sat below:** **Hon. Mary F. Thurber, J.S.C.**

BRIEF ON BEHALF OF DEFENDANTS-RESPONDENTS ADAM AWARI, D.C., IND. AND ADVANCED CHIRO SPINE CENTER

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Submitted: September 16, 2024

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PRELIMINARY STATEMENT

Dr. Awari admitted to having received referral fees from Dr. Ramnanan of between $2,000 and $3,000 in the aggregate over the course of four years. Pa231, p9, ¶¶11-14. The notion that his sworn statement was an "outright fabrication" (Pa115, ¶225), or that it was "literally made up out of whole cloth" (Id. at ¶234) is devoid of logic notwithstanding Plaintiff's incontrovertible assertion that:

- There was no documentary evidence to support this claim;
- There were no checks ever paid by Dr. Ramnanan to Awari;
- There were no emails between Dr. Ramnanan and Awari;
- There were no text messages between Dr. Ramnanan and Awari;
- There were no faxes between Dr. Ramnanan and Awari;
- There were no phone records to show contact between Dr. Ramnanan and Awari;
- There were no recordings of any conversations between Dr. Ramnanan and Awari; and,
- There were no witnesses to support any claims of any type of referral payments from Dr. Ramnanan to Awari.

Pa60, ¶¶225 to 235. It does not strain credulity that actors might attempt to avoid a paper trail when engaging in exchanges intended to remain confidential. The only reasonable inference to be drawn is that Awari admitted his errors because of his belief that he could not successfully defend a charge of having received improper

referral fees. Thus, our beloved criminal justice system worked by bringing about a prompt and just disposition of a controversy that Awari was constrained to confront.

The characterization of Awari as one who was pressured by sharp and overzealous law enforcement practices is hardly the profile of a State actor. But no rationale is offered to show that this well-counselled professional was the victim of State overreach. Although a R. 4:6-2 motion is addressed to the sufficiency of the pleadings, with all favorable inferences accorded the non-moving party, the Court is not required to suspend all common sense in appraising the facts alleged. For conclusory allegations are insufficient to withstand a motion to dismiss.

Plaintiff's allegations fall short of the mark necessary to sustain any element of a malicious prosecution undertaken by Awari, as they are based on nothing more than Plaintiff's unsupportable suspicions or imaginings. First, it would be absurd to find that Dr. Awari assumed a role in the State's investigation into Plaintiff's practices. It is beyond any legitimate argument that this inquiry was initiated strictly by Law Enforcement as part of an investigation into the practices of physicians suspected of sharing fees with chiropractors and other "front line" physicians positioned to refer patients. State actors, among whom Awari is not, are accorded the discretion to examine evidence to inform their ultimate conclusions.

Second, there is no legally sufficient allegation that Dr. Awari engaged in any

act that was actuated by malice. By Plaintiff's admission, Plaintiff and Dr. Awari worked in tandem treating common patients for the years leading up to the State's investigation. The absence of malice, prior to Plaintiff's indictment, is palpable.

Third, a probable cause inquiry does not touch Awari as he did not initiate this investigation. This is not the case of a citizen who reports a crime where it can be fairly said the State acts strictly upon the veracity of the information supplied, whether the witness's attestation is offered in good faith or bad faith. If the witness attests to false facts, he, not the State, must answer for a malicious prosecution. Here, Dr. Awari found himself in the crosshairs of Law Enforcement who took action that could not easily be defended. Awari did not look for the authorities; they found him – and he did not initiate a criminal inquiry; he reacted to one. The notion that he conspired with the State to harm Ramnanan is fanciful but not grounded in reason, even under the rigors of a Rule 4:6-2 standard.

Fourth, a determination of Plaintiff's guilt was not terminated favorably to him, as the criminal action was not decided on its merits. Only certain counts were dismissed with prejudice, where the charges did not fit the facts. The Court did not preclude the State from proceeding with the remainder. That process exemplifies the ordinary function of the court when any litigant, State or private, over-pleads. Likewise, the State acted within its discretion in declining to charge Plaintiff again.

PROCEDURAL HISTORY

Defendants-Respondents, Adam Awari, D.C., Ind., and Advanced Chiro Spine Center, P.C., adopt the Procedural Histories provided by all other parties.

STATEMENT OF FACTS

Defendant Adam Awari, individually and on behalf of Advanced Chiro Spine Center, P.C., relies upon the statement of facts offered by co-defendants. We highlight only those facts that bear directly upon Plaintiff's allegations against Dr. Awari:

Adam Awari, D.C. (Awari) is a chiropractor and owner of Advanced Chiro Spine Center (Pa28; ¶15). Over the years, Dr. Ramnanan referred many of his patients to Awari for chiropractic treatment (PA60, ¶218), and Awari, in turn, referred patients to Dr. Ramnanan for pain management. (Pa60, ¶¶ 219 and 220).

In early 2018 or possibly earlier, Dr. Awari came under the investigation of the Office of the Insurance Fraud Prosecutor upon the suspicion that he was engaged in a practice of unlawful fee sharing with other physicians including the Plaintiff. In exchange for being diverted into Pretrial Intervention and avoiding prosecution carrying a possible prison sentence, Awari agreed to cooperate with the State. Pa231, p9, ¶¶ 5-7. On January 24, 2018 and February 6, 2018, Dr. Awari participated in

proffer sessions with State Defendants and attested to the fact that Plaintiff had paid him referral fees in the aggregate sum of $2,000 to $3,000 over the course of four years spanning 2012 through 2015. Pa231, p9, ¶¶ 7-14.

On March 9, 2018 Dr. Awari entered into Pre-Trial Intervention (PTI), without State opposition, and assumed the corresponding duty to cooperate with the Office of the Insurance Fraud Prosecutor in its investigation of other potential participants engaged in improper fee sharing. Pa59-60, ¶¶213-214. On May 31, 2018 the State filed a superseding indictment against Plaintiff adding charges based upon its investigation into Plaintiff's transactions with Dr. Awari. Pa57, ¶¶204-205.

The gravamen of all allegations against Dr. Awari are conclusory and predicated upon no more than rank speculation and supposition that cannot be fortified by evidence. They are surely insufficient to subject Dr. Awari to the demands of having to defend yet another meritless litigation based upon gauzy hypotheses that have failed to withstand scrutiny in court upon court.

ARGUMENT

STANDARD OF REVIEW

Under Rule 4:6-2(e), a complaint can be dismissed if the facts alleged do not state a viable claim as a matter of law. However, that legal sufficiency requires allegation of all the facts that the cause of action requires. Cornett v. Johnson &

Johnson, 414 N.J. Super. 365, 385 (App. Div. 2010), aff'd and modified, 211 N.J. 362 (2012), failing which, the claim must be dismissed. Ibid. Accord, Printing Mart-Morristown v. Sharp Elec. Corp., 116 N.J. 739, 768 (1989). "[D]ismissal is mandated where the factual allegations are palpably insufficient to support a claim upon which relief can be granted." Rieder v. State Dep't of Transp., 221 N.J. Super. 547, 552 (App. Div. 1987). "[T]he motion should be granted if even a generous reading of the allegations does not reveal a legal basis for recovery . . . . Moreover, the motion may not be denied based on the possibility that discovery may establish the requisite claim; rather, the legal requisites for [plaintiff's] claim must be apparent from the complaint itself." Edwards v. Prudential Property and Cas. Co., 357 N.J. Super. 196, 202 (App. Div. 2003) (citing Camden County Energy Recovery Assocs. v. N.J. Dep't of Envtl. Prot., 320 N.J. Super. 59, 64–65 (App. Div. 1999), aff'd o.b., 170 N.J. 246 (2001)). The essential facts supporting a plaintiff's cause of action must be presented for the claim to survive; conclusory allegations are insufficient in that regard. Scheidt v. DRS Techs., Inc., 424 N.J. Super. 188, 193 (App. Div. 2012). Here, conclusory allegations, to the exclusion of fact, permeate Plaintiff's complaint against Awari.

I. THE LAW DIVISION CORRECTLY HELD THAT RAMNANAN'S NJCRA CLAIMS WERE SUBJECT TO SECTION 1983's RULE OF ABSOLUTE PROSECUTORIAL IMMUNITY

A. State and Federal Law Are Indistinguishable In Their Relevant Dimensions

The New Jersey's Civil Rights Act (NJCRA), N.J.S.A. 10:6-1 et seq. was adopted in 2004 "for the broad purpose of assuring a state law cause of action for violations of state and federal constitutional rights and to fill any gaps in state statutory anti-discriminatory protection." Owens v. Feigin, 194 N.J. 607, 611 (2008). New Jersey as well as federal courts universally agree that the New Jersey Civil Rights Act (NJCRA) was modeled after the federal Civil Rights Act (CRA), 42 USCS § 1983, and is interpreted analogously. Perez v. Zagami, LLC, 218 N.J. 202, 212-213 (2014); Trafton v. City of Woodbury, 799 F. Supp. 2d 417, 443 (D.N.J. 2011) (finding that the District of New Jersey has "repeatedly interpreted [the NJCRA] analogously to §1983"). Given their similarity, our courts apply federal § 1983 immunity doctrines to claims arising under the NJCRA. Gormley v. Wood-El, 218 N.J. 72, 113 (2014).

In analyzing the legislative history of the NJCRA, the New Jersey Supreme Court in Perez, supra, found that:

> The CRA was enacted in 2004 for the profound purpose of "provid[ing] the citizens of New Jersey with a State remedy for deprivation of or interference with the civil rights of an individual." S. Judiciary Comm.

> Statement to S. No. 1158, 211th Leg. 1 (May 6, 2004). According to Governor McGreevey, who signed the bill into law, the CRA was designed as a "State analog to the federal civil rights statute codified at 42 U.S.C.A. [§] 1983" and was not intended to "create any new substantive rights." Governor's Statement on Signing Assembly Bill No. 2073 (Sept. 10, 2004). Instead, it is apparent that the CRA was intended to address potential gaps in remedies available under New Jersey law but not cognizable under the federal civil rights law, Section 1983.

218 N.J. at 212. Thus, "[t]he interpretation given to parallel provisions of [42 U.S.C. §1983] may provide guidance in construing our Civil Rights Act." Harris v. City of Newark, 250 N.J. 294, 306 (2022) (quoting Tumpson v. Farina, 218 N.J. 450, 474 (2014)).

Accordingly, New Jersey courts have looked to the qualified immunity analysis in federal §1983 actions to determine whether to apply qualified immunity to analogous situations involving NJCRA claims. Indeed, the "affirmative defense [of qualified immunity] applies to NJCRA claims and 'tracks the federal standard.'" Cruz v. Camden Cnty. Police Dep't, 466 N.J.Super. 1, 11 (App.Div.), certif. denied, 247 N.J. 400 (2021) (quoting Brown v. State, 230 N.J. 84, 97-98 (2017)). As such, "[f]or purposes of analyzing the qualified-immunity defense advanced in this matter, the examination for [§1983 and the NJCRA] is the same" and thus "we do not differentiate between those claims for purposes of our examination of the asserted affirmative defense." Morillo v. Torres, 222 N.J. 104, 116 (2015).

Plaintiff contends that defendants are only entitled to qualified immunity in a state court setting, but his argument appears to be directed only to the State defendants. While we expect that the State will vigorously defend against the application of qualified immunity, we offer only a brief response to the notion that this doctrine ought to bear upon claims against Dr. Awari.

B. The Doctrine of Qualified Immunity is Limited in Its Application to Claims Against Public Officials

Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982) held that, under the doctrine of qualified immunity, public officials performing discretionary duties within the scope of their employment are "shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." (Emphasis added.) Morillo v. Torres, supra, 222 N.J. at 117, instructs that, in New Jersey, the qualified immunity doctrine is applied, in accordance with the Harlow pronouncement, to civil rights claims brought against law enforcement officials engaged in their discretionary functions. (emphasis added.) Put another way, "[t]he affirmative defense of qualified immunity protects government officials from personal liability for discretionary actions taken in the course of their public responsibilities, insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Brown, supra, 230 N.J. at 97–98. (Internal

citations omitted – emphasis added.) Any discussion of the qualified immunity doctrine must be limited to its applicability to "public officials" and "law enforcement officials" to which the case law cited singularly refers.

That said, the court below correctly recognized that "[a] stand-alone due process claim exists for fabrication of evidence and does not require a conviction as a prerequisite. Black v. Montgomery Cnty., 835 F.3d 358, 370 (3d Cir. 2016). Under Pyle v. Kansas, 317 U.S. 213, 216 (1942), the knowing use by the prosecution of perjured testimony in order to secure a criminal conviction, or merely for the bringing of charges, violates the Constitution. But a fair reading of Plaintiff's complaint is devoid of any credible allegation that Dr. Awari fabricated evidence. As applied to Awari, therefore, any distinction between the doctrines of absolute immunity versus qualified immunity is one without a functional difference. Plaintiff's NJCRA claims for fabrication of evidence, malicious prosecution, and conspiracy are virtually identical to his federal claims, mooting any justification for a contrary outcome.

Regardless of whether State defendants are judged on a standard of absolute immunity or qualified immunity, Point 1 in Plaintiff's brief fails to say a word about Dr. Awari. His initial paragraph reads:

> The Superior Court's holding that the CRA incorporated the federal rule of absolute prosecutorial immunity is contrary to to the CRA's text,

> legislative history and nearly 75 years of precedent confirming that New Jersey law does not confer immunity on prosecutors who act out of personal motive or with malicious intent.

Pb19. His concluding paragraph reads:

> For these reasons, this Court should hold that prosecutors do not enjoy immunity under the CRA where they act with malice, personal reasons, or in excess of jurisdiction. And because the Complaint clearly alleges malice and personal motive, see e.g. Pa31, 40, 42, the Court should reverse the finding that the State Defendants' actions are cloaked in immunity.

Pb28. Nor is there a single mention of Dr. Awari at any point in between. Pb20 to 27. To the extent that the Plaintiff's arguments are directed only to other Defendants, the immunity accorded Dr. Awari must remain inviolate, regardless of its label.

C. An Immunity Determination Must Be Made Early and Summarily

Hunter v. Bryant, 502 U.S. 224, 228 (1991) instructs that, "because the entitlement is an immunity from suit rather than a mere defense to liability . . . [][the United States Supreme Court] repeatedly [] [has] stressed the importance of resolving immunity questions at the earliest possible stage in litigation. See also, Wildoner v. Borough of Ramsey, 162 N.J. 375, 387 (2000), echoing that a defendant's entitlement to immunity is a question of law to be decided as early in the proceedings as possible. Continuing this trend, Minoia v. Kushner, 365 N.J. Super. 304, 307 (App. Div.), certif. denied, 180 N.J. 354 (2004), held that "discovery need not be undertaken or completed if it will patently not change the outcome."

Specifically, the "right to obtain discovery . . . in cases involving . . . immunity statutes is not absolute. Instead, the court may curtail discovery in its discretion if there are no reasonable indicia that a factual basis to surmount the immunities will be uncovered." Hurwitz v. AHS Hosp. Corp., 438 N.J. Super. 269, 277-78 (App. Div. 2014). "A pleading should be dismissed if it states no basis for relief and discovery would not provide one." Rezem Family Associates, LP v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011). If ever this doctrine were applicable, it is here. If ever the pursuit of damages against an actor, who did no more than admit a wrong, were futile, it is here. If ever another bite at the apple were to be foreclosed, it is here.

II. THE QUESTION OF ABSOLUTE IMMUNITY TO STATE DEFENDANTS DOES NOT APPLY TO AWARI, AND HE THEREFORE TAKES NO POSITION AS TO ITS APPLICABILITY TO OTHER PARTIES

III. THE QUESTION OF QUALIFIED IMMUNITY TO STATE DEFENDANTS DOES NOT APPLY TO AWARI, AND HE THEREFORE TAKES NO POSITION AS TO ITS APPLICABILITY TO OTHER PARTIES

IV. THE LAW DIVISION CORRECTLY FOUND THAT AWARI DID NOT ACT UNDER COLOR OF LAW

For an entity to be liable under either the federal or state statute, it is necessary for a plaintiff to show that the defendant acted under color of state law. Wilson v.

County of Gloucester, 256 F.R.D. 479, 488 n.13 (D.N.J. 2009). N.J.S.A. 10:6-2(c) provides that a person may bring a civil action under the New Jersey Civil Rights Act when a person, under color of state law, (1) deprives the person of any due process or equal protection rights, privileges or immunities secured by the federal or state constitution or laws, or (2) interferes with the person's exercise or enjoyment of those substantive rights, privileges or immunities by threats, intimidation, or coercion. West v. Atkins, 487 U.S. 42, 49 (1988)(quoting United States v. Classic, 313 U.S. 299, 326 (1941)), framed the issue thusly:

> The traditional definition of acting under color of state law requires that the defendant in a § 1983 action have exercised power possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.

There is no credible allegation to suggest that Dr. Awari was "clothed with the authority of state law." Ibid. Nor is there a credible allegation that Dr. Awari, a private citizen, was a willful participant in a nefarious joint action or undertaking in concert with the State or its agents. That Dr. Awari was a co-conspirator in joint action with the State or its agents is belied by but a cursory reading of Plaintiff's complaint, where it is alleged:

- Specifically, during their proffer session with Awari, which took place on February 6, 2018, the State Defendants repeatedly and deliberately put words in his mouth regarding the alleged "kickback" scheme between him and Dr. Ramnanan. Pa61, ¶239.

- During their proffer session with Awari, the State Defendants were the first ones to mention "Dr. Ramnanan" by name. Awari never mentioned Dr. Ramnanan on his own. Pa62, ¶240.

- During their proffer session with Awari, the State Defendants were the first ones to suggest that the amount of referral fees that Dr. Ramnanan had paid was actually "$3,000.00." Awari never mentioned this specific sum on his own. Pa62, ¶241.

- During their proffer session with Awari the State Defendants were the first ones to suggest that the amount paid Dr. Ramnanan for each referral was "$500.00." Awari never mentioned this sum on his own. Pa62, ¶242.

- During their proffer session with Awari, the State Defendants invented the "fact" that the cash payments were delivered by Dr. Ramnanan in "envelopes." Awari never mentioned this "fact" on his own.[1] Pa62, ¶243 (quotes in original).

This is hardly the profile of a State actor, and there is no rational inference to be drawn from the complaint that these allegations are other than a fantastical script imagined by the prime target of a criminal investigation conducted in earnest upon righteous grounds. That Law Enforcement personnel had to push Hayek and Awari to gain inculpatory information is hardly remarkable.

[1] The notion that "[d]uring their proffer session with Awari, the State Defendants invented the 'fact' that the cash payments were delivered by Dr. Ramnanan in 'envelopes'" (Pa62, ¶243) is not a factual allegation. It is a conclusory supposition that does not lend itself to the establishment of competent supporting evidence.

V. THE PLAINTIFF HAS FAILED TO MAKE OUT A PRIMA FACIE CASE THAT AWARI ENGAGED IN A MALICIOUS PROSECUTION OF PLAINTIFF THAT PROXIMATELY CAUSED PLAINTIFF DAMAGE

The Second Count of Plaintiff's complaint charges violation of civil rights for malicious prosecution. Pa74 and 75. "Malicious prosecution requires a plaintiff to prove four elements: (1) a criminal action was instituted by this defendant against this plaintiff; (2) the action was motivated by malice; (3) there was an absence of probable cause to prosecute; and (4) the action was terminated favorably to the plaintiff." LoBiondo v. Schwartz, 199 N.J. 62, 90 (2009); Helmy v. City of Jersey City, 178 N.J. 183 (2003) (citing Lind v. Schmid, 67 N.J. 255, 262 (1975)). "[E]ach element must be proven, and the absence of any one of these elements is fatal to the successful prosecution of the claim." Ibid. Each element is separable from the others, although evidence of one may be relevant with respect to another." Lind, supra, 67 N.J. at 262. Upon failure to prove any one element, the cause must fail. Ibid.

The favorable termination element is only satisfied if the criminal case was disposed of in a way that indicates the innocence of the accused. Allen v. New Jersey State Police, 974 F. 3d 497, 502-503 (3d Cir. 2020). Accord, Kessler v. Crisanti, 564 F. 3d 181, 187 (3d Cir.2009). New Jersey courts have framed the inquiry as "whether the termination was or was not dispositive as to the accused's innocence of

the crime." Fleming v. United Parcel Service, Inc., 255 N.J. Super. 108, 150 (Law Div. 1992) (emphasis supplied) (quoting Rubin v. Nowak, 248 N.J. Super. 80, 83 (App. Div. 1991); see also, Penwag Property Co. v. Landau, 148 N.J. Super. 493, 500, (App. Div. 1977), aff'd, 76 N.J. 595, 598 (1978). Our Supreme Court has stated that malicious prosecution is not a favored cause of action because citizens should not be inhibited in instituting prosecution of those reasonably suspected of a crime, absent a showing of recklessness on the part of one who institutes criminal proceedings without any reasonable basis. Lind, supra, 67 N.J. at 62. On the other hand, one who recklessly institutes criminal proceedings without any reasonable basis should be responsible for such irresponsible action. Development of the malicious prosecution cause of action as we know it today is the result of a balancing of these antithetical considerations. Ibid.

There is not a wisp of merit, beyond bald, conclusory allegations in Plaintiff's complaint, to establish that Awari "recklessly instituted criminal proceedings without any reasonable basis," as: 1) Awari did not institute criminal proceedings; and 2) He was anything but reckless in answering the charges he was obliged to confront. Our courts have always distrusted malicious prosecution actions and have retained a strong hand over them. Mondrow v. Selwyn 172 N.J. Super. 379, 384 (App. Div. 1980), quoting Prosser, Torts (4 ed. 1971), § 119 at 846. Here the balance

balance tilts markedly afar from the implausible stand articulated by the grievant, who might thank his lucky stars for having dodged prosecution by a whisker. For his are self-inflicted wounds.

VI. THE LAW DIVISION WAS CORRECT TO FIND THAT AWARI WAS ENTITLED TO TESTIMONIAL IMMUNITY

Dr. Awari adopts and relies upon the arguments set forth in Point I of this brief as well as those articulated by counsel for Defendant-Respondent, Ronald Hayek, set forth in Point II of his brief.

VII. THE LAW DIVISION WAS CORRECT TO FIND THAT THE IIED CLAIM WAS UNTIMELY

Plaintiff was indicted on August 1, 2017. Pa47, ¶140. A superseding indictment, following Awari's proffer sessions, was brought on May 31, 2018. Pa57, ¶204. Plaintiff filed his first civil suit on September 16, 2020 (Pa28, ¶17; Pa4), more than two years after he would have had knowledge of the criminal charges filed against him. His Intentional Infliction of Emotional Distress (IIED) claims are therefore barred by the statute of limitations.

Where the damages sought are for injuries to the person, the applicable statute is N.J.S.A. 2A:14-2, which fixes the period of two years irrespective of the form of the action. Burns v. Bethlehem Steel Co., 20 N.J. 37, 39-40 (1955). Goncalvez v. Patuto, 188 N.J. Super. 620, 630 (App. Div. 1983), made it clear that an emotional

distress claim is subject to two-year personal injury statute of limitations. Montells v. Haynes, 133 N.J. 282, 292 (1993) (citing Ochs v. Federal Ins. Co., 90 N.J. 108 (1982)), which explained that statutes of limitations are essentially equitable in nature, promoting the timely and efficient litigation of claims. They spare courts from litigating stale claims, penalize dilatoriness, and serve as measures of repose. Id. See also, Farrell v. Votator Div., 62 N.J. 111, 115 (1973); and Michaels v. State of N.J., 955 F.Supp. 315, 326 (D.N.J. 1996).

Plaintiff relies upon McDonough vs. Smith, 139 S.Ct.249 (2019) for the proposition that his IIED claim would not have accrued until May 22, 2019, when the court dismissed the criminal charges against him. McDonough is distinguishable, however, as it did not involve an IIED claim. The Court below correctly distinguished the unique accrual date of a statutory civil rights claim as compared to that governing a common law tort claim.

Because Plaintiff knew or should have known about Dr. Awari's adverse statement to Law Enforcement prior to September 16, 2018, i.e., "when all elements of a cause of action are present or, more plainly, from the moment of the wrong," Michaels, supra, 955 F.Supp. at 326, he failed to file a suit within the statute of limitations. Consequently, his right to do so has been forever foreclosed.

CONCLUSION

For the foregoing reasons, we respectfully submit that the decision of the Law Division, dismissing claims against Defendant, Adam Awari, D.C., individually and on behalf of Advanced Chiro Spine Center, P.C., should be affirmed.

Respectfully Submitted,

Law Offices of Richard A. Greifinger
Attorneys for Defendants-Respondents,
Adam Awari, Ind., and Advanced Chiro Spine Center, P.C.

By: _____
Richard A. Greifinger

DR. TERRY RAMNANAN, Plaintiff-Appellant, v. COLIN KEIFFER, ESQ. INDIVIDUALLY, DETECTIVE WENDY BERG, INDIVIDUALLY, DETECTIVE GRACE PROETTA, INDIVIDUALLY, DETECTIVE JOHN CAMPANELLA, INDIVIDUALLY, RONALD HAYEK, D.C., INDIVIDUALLY, UNION WELLNESS CENTER PA LLC, ADAM AWARI, D.C., INDIVIDUALLY, AND ADVANCED CHIRO SPINE CENTER, P.C., Defendants-Respondents.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION DOCKET NO. A-2578-23T4 On Appeal from Order of the Superior Court of New Jersey, Law Division Docket No. Below: BER-L-2146-23 Sat Below: Hon. Mary F. Thurber, J.S.C.

BRIEF OF DEFENDANTS-RESPONDENTS KEIFFER, BERG, PROETTA, AND CAMPANELLA

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PROCEDURAL HISTORY AND STATEMENT OF FACTS[1]

This appeal involves the dismissal of Appellant Terry Ramnanan's civil rights and tort claims against Deputy Attorney General (DAG) Colin Keiffer, and Detectives Wendy Berg, Grace Proetta, and John Campanella (collectively, State Defendants), arising from State Defendants' criminal prosecution of Ramnanan for insurance fraud. The pertinent facts for this appeal are as follows.[2]

Ramnanan's Alleged Insurance Fraud and Criminal Prosecution

Around 2016, State Defendants began investigating an insurance-fraud scheme involving Dr. Ronald Hayek, a chiropractor, who was accused of making illegal payments (kickbacks) in exchange for patient referrals. (Pa27; Pa31; Pa229).[3] In an interview with State Defendants, on April 1, 2016, Dr. Hayek stated that Ramnanan, also a physician, had paid him kickbacks, beginning in

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[1] Because the procedural and factual histories are closely related, they are presented together for the convenience of the court.

[2] The following facts are taken from Ramnanan's complaints and are assumed true only for purposes of this appeal. See Lembo v. Marchese, 242 N.J. 477, 482 (2020) (stating, for an appeal from an order granting a motion to dismiss under Rule 4:6-2(e), this court "must assume that the facts asserted in the complaint are true").

[3] "Pa" refers to Ramnanan's appendix and "Pb" refers to Ramnanan's brief.

2012, in exchange for sending Ramnanan patients. (Pa27; Pa33; Pa230-Pa231). On April 8, 2016, Hayek then recorded a conversation with Ramnanan, in which Ramnanan implied he was paying Hayek kickbacks.[4] (Pa42-Pa45). Also, Hayek mentioned that another person paying kickbacks was Dr. Todd Koppel; and State Defendants believed Koppel was "the leader of a multi-million-dollar insurance fraud scheme." (Pa35).

Based on the allegations against Ramnanan, DAG Keiffer[5] arranged a proffer session with Ramnanan and his criminal defense attorney. (Pa37-Pa38). At the meeting, DAG Keiffer presented defense counsel with a "Kickback Spreadsheet," which purportedly showed all the kickbacks that Ramnanan had paid to Hayek. (Pa39). During the proffer session, DAG Keiffer also asked Ramnanan if he would agree to cooperate with the prosecution and implicate other involved persons. (Pa39). However, no agreement was reached. (Pa42).

Thus, the State Defendants presented the matter to the grand jury, and an indictment was returned on August 1, 2017, charging Ramnanan with various crimes related to commercial bribery. (Pa47; Pa229).

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[4] In the recording, Ramnanan, while Hayek was asking him whether he had told anyone about the kickbacks, said "[n]ah, nah, nah, nah, nah." (Pa44).

[5] At the time, Keiffer was a DAG for the Office of Insurance Fraud Prosecutor. (Pa27).

In December 2017, a second meeting between DAG Keiffer and Ramnanan's counsel occurred to negotiate a resolution and discuss any other allegations against Koppel. (Pa49). Prior to the indictment, DAG Keiffer had provided Ramnanan with a copy of the transcript of Dr. Hayek's recording (Pa46-Pa47), and later provided both an insurance billing summary showing the amounts that Ramnanan billed to insurance companies and a summary chart showing the amount of kickbacks Ramnanan had paid sometime between "early winter of 2017" and "early winter of 2018." (Pa50; Pa52; Pa54).

In February 2018, Defendant Dr. Adam Awari, another chiropractor, told State Defendants during his proffer session that Ramnanan had also paid him kickbacks for patient referrals between 2012 and 2015. (Pa28; Pa60; Pa231). This led to a superseding indictment against Ramnanan on May 31, 2018, adding various health-care-fraud charges in addition to the commercial bribery charges. (Pa57; Pa229).

However, in May 2019, the trial court in the criminal matter dismissed the charges, reasoning that—because the insurance forms Ramnanan submitted did not require any disclosure of referral (kickback) fees—it was not clear whether insurers would have denied claims if referral fees had been disclosed and the insurers made payments on legitimate, medically-required services because,

contrary to the State's interpretation of applicable case law, Awari and Hayek were lawfully permitted to refer patients, irrespective of any referral fee. (Pa226-Pa245).

Ramnanan's District Court Complaint

On October 7, 2020, Ramnanan filed a complaint in the District Court of New Jersey against State Defendants, as well as Awari, Hayek, and others. (Pa81-Pa155). The federal complaint set forth various claims under 42 U.S.C. § 1983, including fabrication of evidence, malicious prosecution, malicious abuse of process, inducement of false testimony, and conspiracy to violate plaintiff's civil rights. (Pa131-Pa148). Additionally, it included state-law claims, under the New Jersey Civil Rights Act (NJCRA) N.J.S.A. 10:6-1 to 6-2, such as fabrication of evidence, malicious prosecution, deprivation of substantive due process, and conspiracy, as well as an intentional infliction of emotional distress (IIED) claim. (Pa149-Pa154).

However, on June 30, 2021, the district court dismissed Ramnanan's federal claims without prejudice, finding that State Defendants were entitled to absolute prosecutorial immunity. (Pa157-Pa159; Pa338). More specifically, the district court held that the alleged wrongful conduct, which was the creation of the transcript and the use of the summary charts, was subject to absolute

prosecutorial immunity because it "was carried out in preparation of, and for use in, grand jury proceedings." (Pa337). The court declined to exercise supplemental jurisdiction over the state-law claims. (Pa341).[6]

Ramnanan subsequently filed a second amended complaint (SAC) on September 13, 2021, alleging substantially the same claims as the prior complaint. (Pa161-Pa221). On March 24, 2023, the district court dismissed the SAC. (Pa223-Pa224). In describing the additions to the SAC in its opinion, the district court noted that Ramnanan had added allegations that State Defendants "presented fabricated evidence to Plaintiff in an effort to gain his cooperation in investigating potential claims against Todd Koppel, M.D.," who was alleged to be the leader of a million-dollar insurance fraud scheme. (Pa345). The four pieces of alleged fabricated evidence were the "Kickback Spreadsheet," the "Hayek Audio Transcript," the "Summary Chart," and the "Insurance Billing Chart." Ibid. The district court noted that the allegations against Hayek and Awari had been modified to allege that they had willingly participated with State Defendants to bring fraudulent charges against Ramnanan. (Pa346).

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[6] The district court also dismissed the claims against Hayek and Awari because they were not state actors, given the complaint alleged the State coerced these defendants. (Pa339-Pa340).

As to the fabrication of evidence claim, the district court dismissed this claim, finding that Ramnanan had failed to satisfy the requirement of "show[ing] a 'reasonable likelihood that, absent the fabricated evidence, [he] would not have been criminally charged.'" (Pa348) (internal citations omitted) (second alteration in original). The malicious prosecution claim was also dismissed because State Defendants' commencement of a criminal proceeding against Ramnanan—even assuming the use of fabricated evidence obtained during the course of their investigation—was "clearly protected by absolute immunity." (Pa349-Pa350). The district court further noted that "case law forecloses Plaintiff's malicious prosecution claim from proceeding against State Defendants because the claim necessarily requires the Court to scrutinize actions State Defendants undertook while engaged in prosecutorial functions." (Pa350).

The district court also dismissed the conspiracy claim because the SAC failed to adequately plead the existence of a conspiracy. Ibid. Moreover, the district court held State Defendants had absolute immunity from the conspiracy claims because Ramnanan, "to allege his Fourteenth Amendment rights were violated, must contend that fabricated evidence was used in his criminal prosecution," which would require the court to "analyze a prosecutorial function: use of fabricated evidence in initiating a criminal proceeding."

(Pa350-Pa351).

Lastly, the district court declined to exercise supplemental jurisdiction over Ramnanan's state-law claims. (Pa351).

Ramnanan's Superior Court Complaint

After having his federal claims dismissed, on April 24, 2023, Ramnanan filed a complaint in the New Jersey Superior Court, asserting claims under the NJCRA for: fabrication of evidence (Count 1), malicious prosecution (Count 2), deprivation of substantive due process (Count 3), conspiracy (Count 4), and intentional infliction of emotional distress (IIED) (Count 5).[7] (Pa25-Pa79).

This complaint again alleged that Defendant Hayek entered into a plea bargain with State Defendants to provide cooperation as to additional insurance-fraud crimes, and, upon being interviewed by State Defendants, indicated that Ramnanan had paid him kickbacks for patient referrals. (Pa31-Pa33). This led to another doctor, Koppel, becoming a target of the investigation, and State Defendants, including Detective Campanella, advised Ramnanan of this. (Pa35-Pa36).

The complaint further alleged that Ramnanan was interviewed by State

[7] The Superior Court complaint is identical, in terms of factual allegations, to the federal complaint and simply removes the § 1983 claims. Compare (Pa25-Pa79), with (Pa80-Pa154).

Defendants regarding Koppel's conduct, and that Defendant DAG Keiffer created a "Kickback Spreadsheet," which showed all alleged kickbacks Ramnanan paid to Hayek, with intention of using it in the criminal prosecution. (Pa37; Pa39). It also alleged State Defendants directed Hayek to secretly record Ramnanan and that the subsequent transcript was then altered by Detective Proetta, to clarify a point where the two were talking over each other (Pa42-Pa44), and that Detective Berg, subsequently lied to Ramnanan about who altered the transcript. (Pa46).[8]

Lastly, the complaint alleged that, after the initial indictment, Detective Campanella created a "Summary Chart" purporting to show the kickbacks Ramnanan had paid to Hayek, and that State Defendants created an "Insurance Billing" chart, showing the insurance companies whom Ramnanan had billed, both of which were created with the intent for use in the criminal prosecution. (Pa51; Pa53-Pa54). It alleged that State Defendants obtained a superseding indictment against Ramnanan because of Defendant Awari's allegation that Ramnanan paid him kickbacks for patients during his 2018 interview with State

[8] Ramnanan concedes that he no longer pursues any claim with respect to alleged altered transcript. (Pb6, n.2).

Defendants. (Pa57; Pa59-Pa61).[9]

State Defendants, along with Awari and Hayek, moved to dismiss the Superior Court complaint. (Pa2). On March 29, 2024, the trial court granted State Defendants' motion and dismissed Ramnanan's claims with prejudice. (Pa1-Pa24).

In its opinion, the trial court recounted the allegations of the complaint and the procedural history regarding Ramnanan's criminal prosecution and his subsequent federal complaint. (Pa2-Pa7). The trial court then considered whether, based on those allegations and the applicable law, State Defendants were entitled to absolute immunity using the standard for motions to dismiss under Rule 4:6-2(e). (Pa7-Pa10). The trial court "concur[ed] with the reasoning of multiple unpublished state court cases holding that the same standards of absolute prosecutorial immunity that govern federal claims under § 1983 apply to the parallel statutory claims under the NJCRA." (Pa12). It held that State Defendants were entitled to absolute prosecutorial immunity from malicious prosecution claims under the NJCRA because Ramnanan's claims related to State Defendants' actions that were "intimately associated with the judicial

[9] Moreover, as Ramnanan's brief points out (Pb33, n.11), the complaint contradictorily concedes Ramnanan "does not seek redress for the State Defendants' grossly improper conduct before the grand jury." (Pa59).

phase of the criminal process." (Pa12) (quoting Fogle v. Sokol, 957 F.3d 148, 159-160 (3d Cir. 2020)). The trial court found that absolute prosecutorial immunity was appropriate because "the crux of the complaint concerned preparation for and conduct of the grand jury proceedings, even as to the allegations about attempts to solicit testimony." Ibid. The court also noted that State Defendants' alleged "coerc[ive]" tactics of attempting to have Ramnanan provide information about Koppel still involved conduct related to the preparation of grand jury proceedings. (Pa12-Pa13).

The trial court further held that, even if State Defendants had lacked absolute immunity for certain of their alleged actions, they still would be entitled to dismissal based on qualified immunity. (Pa13). The court found that, although there is a clearly established right to be free from prosecution from fabricated evidence (Pa14), that Hayek's and Awari's statements that Ramnanan paid kickbacks for patient referrals was sufficient to establish probable cause. (Pa15). Moreover, the trial court found that Ramnanan's allegations did not present a colorable claim for "fabrication" of evidence. (Pa16-Pa17). With respect to the transcript of a conversation between Ramnanan and Hayek, in which an edit was allegedly made to make it appear that Ramnanan was admitting to paying kickbacks, the trial court found this was not fabricated

evidence because the grand jury had access to the unaltered recording and was told, in the event of discrepancy, the unaltered recording controlled. (Pa16). The court also noted that creating a transcript of "two people talking at the same time is surely a matter of some discretion." Ibid. Lastly, the trial court noted the "altered" transcript was not evidence and did not induce Ramnanan to do anything differently. Ibid.

The trial court also rejected any suggestion that the "Kickback Spreadsheet," the "Summary Chart," and the "Insurance Billing" chart were fabricated evidence. (Pa17-Pa18). The court noted State Defendants' rationale for using these documents—which included patients seen by Ramnanan's alleged co-conspirators and procedures performed by those doctors, as well as allegedly legitimate transactions involving Ramnanan—was to show a conspiracy involving co-conspirators' fraudulent insurance submissions. (Pa17). The court found that, although the criminal charges were ultimately dismissed against Ramnanan, it did not mean "these documents and use of them during the investigative phase constitute violations of a clearly established right not to be prosecuted based on fabricated evidence." (Pa17-Pa18).

The trial court also dismissed Ramnanan's conspiracy claim against State

Defendants because there was no underlying constitutional violation. (Pa18.)

Last, the trial court found Ramnanan's IIED claim, which was based on conduct occurring during the pretrial investigation, was barred by the applicable two-year statute of limitation because Ramnanan's claims had accrued, at the latest, in May 2018 (the date of the superseding indictment). (Pa18-Pa19). The trial court noted the cutoff date for filing the complaint would have been in May 2020 and that Ramnanan's complaint asserted that Ramnanan told State Defendants about the fabrication of documents in 2017. (Pa19). However, the initial complaint in federal court, which contained the IIED claim, was not filed until October 7, 2020. (Pa80; Pa154). Thus, the IIED was time-barred. (Pa19).

The trial court dismissed all claims against the State Defendants.[10] (Pa2). This appeal followed. (Pa249-Pa259).

ARGUMENTS

POINT I

THE TRIAL COURT PROPERLY HELD THAT STATE DEFENDANTS HAVE ABSOLUTE PROSECUTORIAL IMMUNITY FROM RAMNANAN'S NJCRA CLAIMS. (Responding to

[10] The trial court also dismissed all claims against Defendants Hayek and Awari because they were not sufficiently involved in any conspiracy and were entitled to grand jury witness immunity. (Pa20-Pa25).

Appellant's Points I and II)

Ramnanan argues State Defendants are not entitled to absolute prosecutorial immunity because: (1) the NJCRA supposedly does not incorporate the federal rule of absolute prosecutorial immunity, and (2) State Defendants lacked absolute immunity for their alleged acts, even under the federal standard for prosecutorial immunity. (Pb19; Pb23; Pb28). As demonstrated below, those positions are demonstrably wrong, the trial court properly granted State Defendants' motion to dismiss, and this court should affirm.

On a motion to dismiss, a court examines "the legal sufficiency of the facts alleged on the face of the complaint, doing so with liberality, and accords every reasonable inference to the plaintiffs." Borough of Seaside Park v. Comm'r of N.J. Dep't of Educ., 432 N.J. Super. 167, 200 (App. Div. 2013) (citing Printing Mart-Morristown v. Sharp Elecs. Corp., 116 N.J. 739, 746 (1989)). A complaint will be dismissed "if it states no basis for relief and discovery would not provide one." Rezem Fam. Assocs. v. Borough of Millstone, 423 N.J. Super. 103, 113 (App. Div. 2011). This court reviews de novo a trial court's decision on a motion to dismiss a complaint for failure to state a claim under Rule 4:6-2(e). W.S. v. Hildreth, 252 N.J. 506, 518 (2023).

A. The Trial Court Properly Found that Absolute Prosecutorial Immunity under the NJCRA Mirrors Prosecutorial Immunity under § 1983.

Ramnanan argues the trial court erred because NJCRA's absolute immunity is more limited than the absolute immunity standard used in § 1983 claims. (Pb19-Pb20). A review of the relevant case law over the past decade confirms the absolute immunity afforded to prosecutors and investigators in § 1983 cases is identical to the absolute immunity applicable to NJCRA claims. However, although no published state case has yet confirmed so, the case law suggests the immunities only differ in that absolute immunity will not apply, in NJCRA claims, if there is criminal conduct, acts outside the scope of employment, or actual malice. However, as discussed in the next section, even assuming absolute immunity under the NJCRA contains this limitation, the trial court's dismissal was appropriate because the complaint fails to adequately plead any conduct that would preclude absolute immunity.

Our Supreme Court has noted that the NJCRA is modeled after § 1983, and, because of this, New Jersey courts interpret the NJCRA similarly to § 1983. Perez v. Zagami, LLC, 218 N.J. 202, 215-16 (2014). Moreover, this court in Brown v. State, 442 N.J. Super. 406, 425 (App. Div. 2015), rev'd on other grounds, 230 N.J. 84 (2017), observed that "our courts apply § 1983 immunity doctrines to claims arising under the [NJCRA.]"

This court has already held, on four instances, that the § 1983 absolute immunity standard applies to NJCRA claims. Most recently and precisely on point with respect to prosecutorial immunity under the NJCRA, in Gensinger v. Reyes, No. A-2701-18 (App. Div. Nov. 16, 2020) (slip op. at 3-4), this court found that absolute prosecutorial immunity, similar to § 1983, shielded a prosecutor from a NJCRA claim.[11] In Gensinger, after being found not guilty on theft-by-deception charges, the plaintiff brought a NJCRA claim against the prosecutor who had presented the matter to the grand jury. Id. at 1-2. The trial court dismissed the NJCRA claim against the prosecutor based on absolute prosecutorial immunity. Id. at 2. In the resulting appeal, the plaintiff alleged that absolute immunity did not apply because the prosecutor had "no legal or factual basis to" prosecute her, "failed to provide exculpatory evidence to the grand jury" and "allegedly us[ed] false testimony before the grand jury . . . ." Id. at 4. However, this court rejected those arguments because plaintiff's allegations did "not assert that [the prosecutor] ever functioned in an administrative or investigative role, which would not afford him absolute immunity." Ibid.

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[11] Because the trial court discussed the following unpublished cases, and Ramnanan cites to them (Pb21, n.5), this brief also cites to these cases and includes them in a supplemental appendix pursuant to Rule 1:36-3. There are no contrary opinions known.

The Gensinger court further noted that, because the NJCRA is interpreted analogously to § 1983, New Jersey "courts apply federal law's immunity doctrines to claims arising under the NJCRA." Id. at 3 (citing Perez, 218 N.J. at 213-15; Gormley v. Wood-El, 218 N.J. 72, 113-15 (2015)). Thus, prosecutors are absolutely immune from NJCRA claims for actions associated with the "judicial phase of the criminal process." Ibid. (citing Imbler v. Pachtman, 424 U.S. 409. 431 (1976) (additional citations omitted)). And absolute immunity applies to "any acts taken in preparation for initiation of the case, and presentation of the State's case," even if done without a good faith belief of any wrongdoing. Id. at 4 (citations omitted). The court in Gensinger noted that "[a]cts taken in preparation include the evaluation of evidence collected by investigators and the failure to conduct an adequate investigation before filing charges." Ibid. (citing Buckley v. Fitzsimmons, 509 U.S. 259, 273 (1993) (additional citations omitted)).

Significantly, as noted, Gensinger is not unique among New Jersey state-court decisions in its view that absolute prosecutorial immunity applies to claims under the NJCRA; this court has confirmed the principle that New Jersey "courts apply § 1983 immunity doctrines to claims arising under the [NJ]CRA" in three other unpublished cases over the past decade. Small v. State, No. A-4113-13

(App. Div. Mar. 12, 2015) (slip op. at 6) (applying § 1983's absolute immunity to NJCRA claims); see also, e.g., Aletta v. Bergen Cnty. Prosecutor's Off., No. A-0631-21 (App. Div. May 29, 2024) (slip op. at 9-10) (applying absolute immunity to both § 1983 and NJCRA claims against prosecutors and investigators who allegedly prosecuted plaintiff for improper motives and presented false statements to grand jury); Bovery v. Monmouth Cnty. Prosecutor's Off., No. A-2940-18 (App. Div. Sep. 16, 2020) (slip op. at 4) (affirming the dismissal of plaintiff's NJCRA claims, in which plaintiff alleged prosecutors "wrongly instituted and pursued" criminal charges, due to absolute prosecutorial immunity and noting "our courts apply section 1983 immunity doctrines to [NJCRA] claims").

Reflecting the dearth of state-court support for his arguments, Ramnanan's brief purports to rely on three unpublished federal-court opinions for the proposition that prosecutors do not have absolute prosecutorial immunity from NJCRA claims. (Pb22, n.6).[12] It should be noted, however, that these unpublished federal court opinions "are not binding authority" on New Jersey's state courts, State v. O'Donnell, 255 N.J. 60, 81 (2023), and that Rule 1:36-3

[12] Ramnanan, however, makes these legal arguments in a footnote. See Almog v. Israel Travel Advisory Serv., Inc., 298 N.J. Super. 145, 155 (App. Div. 1997) (holding that legal issues raised in footnotes will not be considered on appeal).

specifically provides that "[n]o unpublished opinion shall constitute precedent or be binding on any court." However, even assuming these three unpublished federal-court opinions are relevant, Ramnanan is incorrect in both his interpretation of those three unpublished federal-court opinions and of the overall federal case law on this issue. As discussed below, the federal case law clearly shows that absolute prosecutorial immunity is applicable to NJCRA claims.

As to one of the cases cited by Ramnanan, the court in Pitman v. Ottehberg, No. 10-2538, 2015 WL 179392 (D.N.J. Jan. 14, 2015), did not even address whether absolute prosecutorial immunity applies to NJCRA claims. Instead, the court unambiguously noted, in the relevant section heading of its opinion, that its discussion of prosecutorial immunity dealt only with "Prosecutorial Immunity as to [A] State Malicious Prosecution Claim," noting that N.J.S.A. 59:3-8 of the New Jersey Tort Claims Act (NJTCA) codified a more limited form of prosecutorial immunity for tort claims. Id. at *9 (emphasis added). Moreover, the Pitman court actually noted that "prosecutors are entitled to broad immunity under New Jersey law" but simply that this "prosecutorial immunity is not absolute unlike its federal counterpart. Ibid.

The court in Kirby v. Borough of Woodcliff Lake, No. 20-cv-01670, 2021

WL 5905712, at *6 (D.N.J. Dec. 14, 2021), does conclude that prosecutorial immunity from NJCRA claims is more limited than the scope of the federal immunity, but the cursory discussion of the issue in those decisions is not persuasive and fails to mention—let alone distinguish—relevant State precedent such as Perez, 218 N.J. at 213-15, and Brown, 442 N.J. Super. at 425, in which New Jersey's courts expressly held that the same immunity principles that apply under § 1983, apply under the NJCRA. However, the Kirby court did note that the § 1983 absolute immunity only differs from the absolute immunity applicable to NJCRA claims in "that there are indeed circumstances in which a prosecutor will incur civil liability for his official conduct." Kirby, 2021 WL 5905712, at *6 (quoting Cashen v. Spann, 66 N.J. 541, 549 (1975)). And Louis v. New Jersey, No. 22-cv-4490, 2023 WL 4074098, at *7-8 (D.N.J. June 16, 2023), focuses on statutory provisions applicable to tort claims under the NJTCA and the 1975 decision in Cashen, which predates the passage of the NJCRA (enacted in 2004). Moreover, the Louis court actually found the prosecutor defendants were entitled to absolute immunity, and dismissed the NJCRA claims with prejudice, because the prosecutor defendants, similar to the State Defendants here, interviewed witnesses and prepared for trial, which the court found to be actions within the scope of their employment. Id. at *7, 12.

And, consistent with other federal case law, the Louis court did not find that there was no absolute immunity for NJCRA claims, but rather, it found "[u]nlike its federal counterpart, 'absolute immunity' under New Jersey law is not 'absolute,' and 'a prosecutor [can] incur civil liability for his official conduct' in some circumstances." Id. at *7 (citations omitted) (second alteration in original).

Further, all these federal cases, cited by Ramnanan, base their holding on Cashen v. Spann, 66 N.J. 541 (1975). In Cashen, our Supreme Court made clear the distinction between prosecutorial absolute immunity and judicial immunity by noting prosecutorial immunity will not apply if the prosecutor acts "with malicious intent, or in excess of his jurisdiction." Id. at 547-52; see also Aletta, No. A-0631-21 (slip op. at 8) (stating, in departing from § 1983, "New Jersey courts have further limited [absolute] immunity's bounds" in that it will not apply if a prosecutor acts for personal motives, with malicious intent, or outside his employment). However, there is no published case law clarifying that this Cashen limitation to absolute immunity is applicable to NJCRA claims because Cashen affirmed the Appellate Division's application of absolute prosecutorial immunity as to tort claims, not as to any civil rights claims brought under the NJCRA. Cashen, 66 N.J. at 544, 552.

Further, there is a wealth of federal opinions finding prosecutor defendants entitled to absolute immunity as to NJCRA claims. See, e.g., Richardson v. New Jersey, No. 16-cv-135, 2019 WL 6130870, at *7 (D.N.J. Nov. 18, 2019) (stating "this Court has applied the absolute prosecutorial immunity principles . . . to claims under the NJCRA"); Alexander v. Borough of Pine Hill, No. 1-17-cv-6418, 2018 WL 2215515, at *4-5 (D.N.J. May 15, 2018) (finding absolute immunity applicable to both § 1983 and NJCRA claims); Frost v. Cnty. of Monmouth, No. 3:17-cv-4395, 2018 WL 1469055, at *8 (D.N.J. Mar. 26, 2018) (applying prosecutorial immunity analysis in parallel to claims under § 1983 and NJCRA); Simmons v. Roxbury Police Dep't, No. 17-2526, 2017 WL 5188060, at *11 (D.N.J. Nov. 9, 2017) (applying absolute prosecutorial immunity to NJCRA claim); Williams v. Vanderud, No. 16-1245, 2017 WL 4274265, at *11 (D.N.J. Sept. 26, 2017) (stating "claims under the NJCRA are generally coterminous with and subject to the same defenses and immunities as those brought under § 1983").

In short, the trial court correctly found that the NJCRA absolute immunity standard is identical to the standard used in § 1983 cases. (Pa12). Assuming the Cashen limitation to absolute immunity is applicable to NJCRA claims and that the trial court did not consider this limitation, its dismissal order should still

be affirmed because the complaint only pleaded conclusory allegations of malice, as discussed in the next section.[13]

B. Absolute Immunity Applies to State Defendants' Alleged Actions.

The trial court correctly concluded that absolute prosecutorial immunity applied to the allegations against State Defendants. (Pa12-Pa13). In determining whether absolute immunity applies, courts use a "functional approach" which "looks to 'the nature of the function performed, not [merely] the identity of the actor who performed it.'" Buckley, 509 U.S. at 269 (first quoting Burns v. Reed, 500 U.S. 478, 486 (1991), then quoting Forrester v. White, 484 U.S. 219, 229 (1988)). That same immunity extends to an investigator for the prosecutor's office "when the employee's function is closely allied to the judicial process." Davis v. Grusemeyer, 996 F.2d 617, 631 (3d Cir. 1993). In other words, "investigators for a prosecutor performing investigative work in connection with a criminal prosecution deserve the same absolute immunity as the prosecutor." Fuchs v. Mercer Cnty., 260 F. App'x 472, 475 (3d Cir. 2008) (quoting Davis, 996 F.2d at 632).

Here, absolute immunity was appropriately granted to State Defendants

[13] "[A]ppeals are taken from orders and judgments and not from opinions [or] oral decisions . . . ." Do-Wop Corp. v. City of Rahway, 168 N.J. 191, 199 (2001).

because all their acts, as alleged in Ramnanan's complaint, were in furtherance of the grand jury presentment and criminal prosecution of insurance fraud. See generally (Pa32-Pa54). The complaint essentially alleges that DAG Keiffer obtained Ramnanan's name from Awari and Hayek and that State Defendants prepared the charts and transcript used to present the matter to the grand jury and prosecute Ramnanan. (Pa32-Pa33; Pa37; Pa39; Pa42-Pa44; Pa53-Pa54).

Thus, on this record, absolute immunity applies to State Defendants because interviewing witnesses, preparing evidence, and presenting that evidence to the grand jury were acts taken by State Defendants in preparation for Ramnanan's criminal prosecution. To be sure, even if State Defendants' prosecution was done without a good faith belief of any wrongdoing and without adequately conducting an investigation before charging, absolute immunity would still apply. See Kulwicki v. Dawson, 969 F.2d 1454, 1464 (3d Cir. 1992) ("A prosecutor is absolutely immune when making th[e] decision [to initiate a prosecution], even where he acts without a good faith belief that any wrongdoing has occurred."). In the same vein, DAG Keiffer's "direct solicitations of testimony for use in the grand jury proceedings" are also subject to absolute immunity. See Rose v. Bartle, 871 F.2d 331, 344 (3d Cir. 1989) ("Such solicitations are encompassed within 'the preparation necessary to present a

case' and therefore are immunized as involving the prosecutors' advocacy functions.") (citation omitted). Similarly, everything alleged to have been done by the other State Defendants--Proetta, transcribing Ramnanan's recorded conversation, Berg, providing information about the transcript, and Campanella, preparing the summary chart--were all done with intention of presentation to the grand jury and prosecution of Ramnanan, as even the complaint alleges. (Pa39; Pa51; Pa53-Pa54).

Further, the complaint does not allege that State Defendants engaged in conduct that is criminal, outside the scope of their employment, or done with actual malice, such that absolute immunity would be inapplicable. Cashen, 66 N.J. at 547-52; Aletta, No. A-0631-21 (slip op. at 8). Rather, the complaint alleges conduct that is exactly within a prosecutors' duty, such as interviewing witnesses, compiling evidence for prosecution, and presenting the matter to a grand jury. See State v. Rivera, 437 N.J. Super. 434, 443 (App. Div. 2014) (stating "[t]he primary duty of a prosecutor is . . . to see that justice is done" and it must "use every legitimate means to bring about a just" conviction) (citations omitted); see also N.J.S.A. 2A:158-5 (stating prosecutors "shall use all reasonable and lawful diligence for the detection, arrest, indictment and conviction of offenders against the laws").

Again, the complaint here alleges only that State Defendants interviewed Awari, Hayek, and Ramnanan, obtained cooperation from Awari and Hayek, recorded Ramnanan admitting his involvement in the kickback scheme, failed to obtain cooperation from Ramnanan, and compiled the evidence used to present the matter to the grand jury. (Pa31-Pa33; Pa36- Pa39; Pa42-Pa44; Pa47, Pa50, Pa53, Pa56-Pa57, Pa59). These are all classic prosecutorial functions and acts within the scope of State Defendants' employment. And simply alleging, in conclusory fashion as Ramnanan does, that State Defendants acted out of personal motive or malice, without providing supporting facts is insufficient to overcome the application of absolute immunity. See Aletta, No. A-0631-21, at (slip op. at 9) (affirming the application of absolute immunity, as to NJCRA claims, to prosecutor's decision to charge and prosecute plaintiff and rejecting plaintiff's conclusory assertions that prosecutors acted with malice and for personal motives to be "purely speculative" and based on "a tenuous chain of unsupported inferences").

Here, Ramnanan alleges malice is shown by the dismissal of the criminal charges, the inclusion of other patients in the "Kickback Spreadsheet," and the audio recording of Ramnanan admitting to paying kickbacks. (Pb28; Pa31; Pa40; Pa42). Such allegations, even if accepted as true, are insufficient because

these allegations do not show any wrongful act. Malice is defined as "[t]he intent, without justification or excuse, to commit a wrongful act." Black's Law Dictionary (12th ed. 2024) (emphasis added); see also Van Engelen v. O'Leary, 323 N.J. Super. 141, 151 (App. Div. 1999) (explaining that actual malice, under the NJTCA absolute immunity statute, means the "commission of a forbidden act with actual . . . knowledge that the act is forbidden") (citations omitted) (alteration in original). Upon review of the record, Ramnanan's allegations of malice are the same conclusory allegations the Aletta court found insufficient. See Aletta, No. A-0631-21, at (slip op. at 9).

For example, as discussed throughout this brief, the dismissal of the criminal charges does not show any intent to commit a wrongful act because the charges were dismissed by the court due to the ambiguity as to whether insurers needed to be apprised of the kickbacks and the State's erroneous interpretation of applicable case law. (Pa229-Pa238). However, ambiguity in how insurers would react to kickbacks and a differing interpretation of case law is not a wrongful act. In addition, the inclusion of other patients in the "Kickback Spreadsheet" cannot implicate any wrongful act because Ramnanan was charged with conspiracy, and others, such as Dr. Koppel, Awari, and Hayek, were being investigated for insurance fraud. (Pa32; Pa36; Pa47; Pa57). Lastly, the use of

the recording of Ramnanan does not show evidence of any intent to commit a wrongful act because, in the recording, while Hayek was asking him whether he had told anyone about the kickbacks, Ramnanan said "[n]ah, nah, nah, nah, nah" and the grand jury had access to the actual recording. (Pa3; Pa44; Pa231).

In short, even accepted as true, none of the allegations in the complaint show any intent of State Defendants to commit any wrongful act and all allegations of malice presented on appeal are merely conclusory, which is insufficient to preclude absolute immunity. See Aletta, No. A-0631-21, at (slip op. at 9) (rejecting plaintiff's conclusory assertions that prosecutors acted with malice because those assertions were "purely speculative" and based "on a tenuous chain of unsupported inferences").

Moreover, Ramnanan argues that State Defendants are not entitled to absolute prosecutorial immunity because State Defendants were engaged in investigative conduct prior to the establishment of probable cause and that State Defendants manufactured evidence and failed in trying "to cajole Ramnanan into testifying against Koppel." (Pb29-Pb30). Ramnanan's argument should be rejected because "[t]he mere invocation of the catch-word 'investigatory'. . . cannot suffice . . . to forestall dismissal on immunity grounds." Rose, 871 F.2d at 345. And as indicated before, the State Defendants' "direct solicitations of

testimony for use in the grand jury proceedings" are subject to absolute immunity as part of the "preparation necessary to present a case." Id. at 344 (citation omitted).

Ramnanan's fabrication claim also fails because absolute immunity still applies even if a prosecution is done without a good faith belief of any wrongdoing and without adequately conducting an investigation before charging. Kulwicki, 969 F.2d at 1464. Moreover, assuming the fabricated-evidence claim is true, courts have granted immunity from claims alleging a prosecutor used "false testimony in connection with [a] prosecution" "so long as they did so while functioning in their prosecutorial capacity." Yarris v. Cnty. of Del., 465 F.3d 129, 137, 139 (3d Cir. 2006) (first quoting Kulwicki, 969 F.2d at 1465). Here, the alleged fabricated-charts were part of acts taken in preparation for initiation of Ramnanan's prosecution and grand jury presentment because they were produced to Ramnanan with the intention of use in his prosecution. (Pa39; Pa51; Pa53-Pa54). Thus, because State Defendants functioned in their prosecutorial capacities with respect to the alleged fabricated-charts, the court did not err in finding that the fabrication claims are subject to absolute prosecutorial immunity. (Pa12).

For these reasons, the trial court's application of absolute immunity for

State Defendants was appropriate.

POINT II

THE TRIAL COURT PROPERLY FOUND THAT, AT MINIMUM, STATE DEFENDANTS HAD QUALIFIED IMMUNITY FROM RAMNANAN'S CLAIMS. (Responding to Appellant's Point III)

Ramnanan next contends that State Defendants are also not entitled to qualified immunity because no probable cause existed for the criminal charges against him and because State Defendants supposedly knew there was no evidence of unlawful conduct by Ramnanan. (Pb34-Pb35). The trial court aptly rejected that argument in concluding that (assuming for the sake of argument that State Defendants lacked absolute immunity), State Defendants had, at minimum, qualified immunity. (Pa15-Pa18). This court should, too, for the reasons set forth below.

This court reviews de novo a trial court's determination that a defendant is entitled to qualified immunity. Ramos v. Flowers, 429 N.J. Super. 13, 20 (App. Div. 2012). The doctrine of qualified immunity, which tracks the federal standard, shields all public officials from liability except those who are "plainly incompetent or those who knowingly violate the law." Brown v. State, 230 N.J. 84, 98 (2017) (quoting Morillo v. Torres, 222 N.J. 104, 118 (2015) (additional citations omitted)). The doctrine requires inquiries into whether "the officer's

conduct violated a constitutional right" and whether that constitutional "right was clearly established" at the time that defendant acted. Brown, 230 N.J. at 98 (quoting Saucier v. Katz, 533 U.S. 194, 201 (2001)). Most pertinent to this case, the existence of "probable cause is an absolute defense" to NJCRA claims. Wildoner v. Borough of Ramsey, 162 N.J. 375, 389 (2000).

Here, State Defendants prosecuted Ramnanan based on two witness statements and evidence they obtained in their investigation that indicated that Ramnanan was involved in health-insurance fraud, which could lead a reasonable person to believe that probable cause existed Ramnanan had committed a crime. (Pa230-Pa231). More specifically, the trial court properly found that probable cause existed because Awari and Hayek had indicated that Ramnanan was paying kickbacks for patients. (Pa15). Awari's and Hayek's statements were, therefore, an apt basis to conclude that probable cause existed. See Wildoner, 162 N.J. at 390 (stating "[p]robable cause to arrest can be based on the statement of a witness").

Qualified immunity also applies to the fabricated-evidence claim because there was no constitutional violation that resulted from the alleged fabricated evidence. As the trial court noted and Ramnanan conceded, the alleged fabricated evidence did not induce Ramnanan to act differently because

Ramnanan did not plead guilty despite being presented with the "fabricated" evidence. (Pa16-Pa17; Pa47). With respect to the spreadsheet and charts, the inclusion of entries, alleged improper by Ramnanan, did not violate any constitutional right because one of the charges against Ramanan was conspiracy[14] (Pa47; Pa57), so it was appropriate to include potential misconduct of others in the charts and spreadsheet.

Accordingly, on this record, the trial court did not err by finding that, at minimum, State Defendants had qualified immunity from Ramnanan's claims.

POINT III

THE TRIAL COURT CORRECTLY HELD THAT RAMNANAN'S IIED CLAIM WAS TIME-BARRED. (Responding to Appellant's Point VII)

Lastly, Ramnanan argues his IIED claim was not untimely because the IIED claim did not accrue until the favorable termination of his prosecution on May 23, 2019. (Pb47). Alternatively, Ramanan argues the IIED claim did not accrue in September 2018 because he did not know that certain evidence was false at that time. (Pb49). Those arguments both fail.

Under the New Jersey Tort Claims Act, a "claimant shall be forever barred from recovering against a public entity or public employee if . . . [t]wo years

[14] Under N.J.S.A. 2C:5-2, a conspiracy involves an agreement with other persons to engage in criminal conduct.

have elapsed since the accrual of the claim . . . ." N.J.S.A. 59:8-8. A cause of action accrues "when a plaintiff knows or, through the exercise of reasonable diligence, should know of the basis for a cause of action against an identifiable defendant." The Palisades at Fort Lee Condo. Ass'n, Inc. v. 100 Old Palisade, LLC, 230 N.J. 427, 447 (2017).

Here, the IIED claim accrued in 2017 when Ramnanan was aware the State Defendants were going to use the alleged fabricated evidence in his criminal investigation and prosecution. (Pa41; Pa58). More specifically, Ramnanan became aware of the fabricated evidence at that time because, in his complaint, Ramnanan alleges all the fabricated evidence was created in 2016 and 2017 (Pa58; Pa10), and that on November 8, 2016, his criminal defense counsel advised the State Defendants the "Kickback Spreadsheet" was fabricated. (Pa41). Moreover, Ramnanan explicitly alleges in his complaint that State Defendants advised him they would seek to use the alleged-fabricated evidence against him. (Pa58) (alleging "[a]s a result of this fabricated evidence, Dr. Ramnanan was forced to defend himself" against criminal charges). Thus, Ramnanan would have known he had a potential IIED claim in 2017.

Moreover, Ramnanan's argument his IIED claim did not accrue because he was not aware the evidence was fabricated at the time (Pb49), is "defeated

by the very language of the complaint, in which plaintiff repeatedly asserts that his criminal defense counsel told the State Defendants, in 2017, that the various documents proffered were fabricated." (Pa19; Pa41). Also undermining Ramnanan's argument, the complaint alleges that between "early winter of 2017" and "early winter of 2018," Ramnanan's counsel received the alleged fabricated insurance billing summary and the summary chart. (Pa50; Pa52; Pa54).

Alternatively, even assuming the accrual date was May of 2018 (the date of the superseding indictment), the IIED claim would still be untimely because the initial federal complaint, which contained the IIED claim, was not filed until October 7, 2020. (Pa154-Pa155). Thus, the trial court did not err in finding that the IIED claim was time barred. (Pa19).

However, Ramnanan argues that his IIED claim accrued on the date of the favorable termination of his criminal proceedings based on case law suggesting claims akin to malicious prosecution have "delayed" accrual. (Pb47). However, the trial court was correctly "not persuaded" that the statute of limitations for Ramnanan's emotional distress claim could be deferred. (Pa24). The trial court was correct because, upon closer review, the case law cited by Ramnanan was distinguishable. Ibid. For example, McDonough v. Smith, 588 U.S. 109, 116

(2019), is distinguishable because it discussed fabrication of evidence in the § 1983 context, not in the context of IIED claims, and Kelley v. Reyes, No. 2:19-cv-17911, 2020 WL 3567285, at *6 (D.N.J. July 1, 2020), is distinguishable because the plaintiffs there alleged "IIED claims . . . [arising] out of their wrongful convictions . . . [u]nder Heck's[15] principle," whereas Ramnanan's complaint asserts an IIED claim arising out of the alleged unlawful prosecution. (Pa77; Pa289). Thus, as the court correctly found, the IIED claim accrued when Ramnanan knew he had a cause of action against State Defendants in 2017, which is the date Ramnanan knew of the alleged fabricated evidence was being used against him.

Alternatively, even if the IIED claim is not time-barred, it is still barred by the Tort Claim Act's provision prohibiting suit over injuries caused by "instituting or prosecuting any judicial" proceeding. See N.J.S.A. 59:3-8 (stating "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment"); see also N.J.S.A. 59:3-3 (stating "[a] public employee is not

[15] In Heck v. Humphrey, 512 U.S. 477, 489-90 (1994), the Supreme Court concluded "a § 1983 cause of action for damages attributable to an unconstitutional conviction or sentence does not accrue until the conviction or sentence has been invalidated."

liable if he acts in good faith in the execution or enforcement of any law"). As argued throughout this brief, all the alleged acts of State Defendants, which included interviewing witnesses, compiling evidence, and presenting to the grand jury (Pa39; Pa51; Pa53-Pa54), were done in preparation of the grand jury presentment and prosecution of Ramanan for insurance fraud.

CONCLUSION

For the foregoing reasons, this court should affirm the trial court's March 29, 2024 order granting State Defendants' motion to dismiss.

Respectfully submitted,

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Dated: October 1, 2024

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

To be argued by:
Joseph Pace

DR. TERRY RAMNANAN,

Plaintiff-Appellant

v.

COLIN KEIFFER, WENDY BERG, GRACE PROETTA, JOHN CAMPANELLA, RONALD HAYEK, D.C., UNION WELLNESS CENTER P.A. LLC, ADAM AWARI, D.C., and ADVANCED CHIRO SPINE CENTER, P.C.,

Defendants-Respondents.

CIVIL ACTION
Docket No. A-002578-23 T4

ON APEAL FROM

SUPERIOR COURT, LAW DIVISION
BERGEN COUNTY
Docket No. BER-L-002146-23

Honorable Mary F. Thuber, J.S.C.
Sat Below

REPLY BRIEF FOR APELLANT TERRY RAMNANAN

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INTRODUCTION

Appellees' fail to advance any viable defenses of the Superior Court's order. State Defendants do not address the text, legislative history, or canons of construction that foreclose the conclusion that the NJCRA incorporated federal absolute prosecutorial immunity rules. Nor do they confront the Complaint's detailed allegations of willful misconduct and malice, which vitiate any claim to immunity under state law.

Hayek and Awari's defense—that their participation in the evidence fabrication scheme was somehow involuntary because they were responding to offers of leniency and undefined prosecutorial "pressure"—finds no support in law or in the Complaint. An offer of leniency is a naked appeal to self-interest, which criminal defendants are presumed capable of freely rejecting. And while external pressure may negate willfulness in some circumstances, that determination requires a fact-intensive inquiry that was not undertaken below.

Appellees similarly fail to defend the dismissal of Ramnanan's IIED claims as untimely. They offer no authority or rationale for excluding IIED claims from *McDonough*'s delayed accrual rule, even though it concededly governs the fabrication claim. Moreover, they cannot explain how Ramnanan could have pled a viable IIED claim, capable of surviving qualified immunity, based on what was

known to him about each Defendant's role in the unlawful scheme prior to September 2018. For these reasons, the order below should be reversed in its entirety.

ARGUMENT

I. STATE DEFENDANTS ARE NOT ENTITLED TO PROSECUTORIAL IMMUNITY

As set forth in the Opening Brief (19-27), the Superior Court's holding that the Legislature intended to supplant limited prosecutorial immunity with its federal counterpart is inconsistent with NJCRA's text, legislative history, and every relevant canon of construction. State Defendants' only answer in opposition is to cite to a handful of unpublished, non-binding decisions that—like the opinion below—failed to address any of these tools of statutory construction.

Having failed to meaningfully defend the holding that absolute prosecutorial immunity applies to NJCRA claims, State Defendants resort to arguing that the Complaint fails to plead malice or willful misconduct. That is demonstrably false. *See, e.g.*, Pa26 (State Defendants "manufactured evidence, altered documents and coerced witnesses to give false, misleading and dishonest testimony, for the purpose of generating a 'high profile case' that could advance their careers and promote their own agendas."); Pa30 ("State Defendants resorted to lying, cheating and manufacturing evidence to fill in the gaps in their misguided and utterly baseless prosecution."); Pa31 ("'the State intentionally subverted the grand jury process'") (quoting Judge Vinci's order); Pa33-35 (State Defendants knew Hayek's testimony

was false); Pa39-40 ("Keiffer . . . created a completely false 'smoking gun' document" to force Ramnanan to testify); Pa46-47 (State Defendants use fabricated evidence to secure indictment); Pa50 (State Defendants continued fabricating evidence after indictment failed to secure Ramnanan's cooperation); Pa53-56 (State Defendants fabricated "Insurance Billing" chart to reach charging threshold); Pa56-58 (State Defendants used fabricated evidence to file false charges to coerce Ramnanan into cooperating). These allegations far exceed the specificity of those in *Aletta v. Bergen Cnty. Prosecutor's Off.*, No. A-0631-21 (App. Div. May 29, 2024).

Because prosecutors in New Jersey do not enjoy immunity for malicious and willful misconduct, and because the Complaint pleads both, the immunity finding below should be reversed without delving into the academic question of whether State Defendants would enjoy immunity *if* federal law applied. But even that question resolves in Ramnanan's favor: absolute immunity does not extend to evidentiary fabrications during the investigative stage, prior to the establishment of probable cause. Opening Br. 30-32. State Defendants respond that prosecutorial immunity extends to all their actions during the evidence-gathering phase (including the manufacturing of evidence) because those steps were taken in furtherance or anticipation of grand jury presentment. Federal courts have consistently rejected this expansive view of immunity and refused to allow prosecutors to immunize investigative misconduct by labeling it trial preparation. *Id*.

The cases cited in opposition are not to the contrary. *Kulwicki v. Dawson*, 969 F.2d 1454 (3d Cir. 1992), held that absolute immunity protects the decision to prosecute, not evidentiary fabrications used to create probable cause. To the extent that *Rose v. Bartle*, 871 F.2d 331 (3d Cir. 1989), held that absolute immunity applies to any false statement suborned for use in a prosecution, that decision is no longer good law. *See Buckley v. Fitzsimmons*, 509 U.S. 259, 275-76 (1993) ("prosecutor may not shield his investigative work with the aegis of absolute immunity" by recasting investigative work as "preparation for a possible trial"). Nor is it germane given the Complaint's allegations that State Defendants originally manufactured the evidence, not in anticipation of bringing charges, but to coerce and intimidate Ramnanan during the investigation against Koppel. Pa36-38, 57-58. And in *Yarris v. Cty. of Del*., 465 F.3d 129 (3d Cir. 2006), the Third Circuit confirmed that prior to the establishment of probable cause—which never existed here—prosecutors are deemed to act in their investigative capacity and cannot claim absolute immunity. *Id.* at 138-39. For these reasons, State Defendants are not entitled to prosecutorial immunity.

II. STATE DEFENDANTS ARE NOT ENTITLED TO QUALIFIED IMMUNITY

The Superior Court's qualified immunity finding was in error, for all of the reasons set forth in the Opening Brief (33-34)—none of which State Defendants even pretend to answer.

State Defendants' assertion that Ramnanan has no fabrication claim because the manufactured evidence did not "induce [him] to act differently" is nonsensical. "Acting differently" is not an element of a fabrication claim; and, to the extent State Defendants mean to argue that Ramnanan cannot demonstrate an injury, that is a non-starter given the Complaint's allegations that the manufactured evidence was ultimately used to initiate a baseless prosecution. *See Halsey v. Pfeiffer*, 750 F.3d 273, 292 (3d Cir. 2014) (using fabricated evidence to bring criminal charges violates clearly established right).

III. THE COMPLAINT PLED THAT AWARI AND HAYEK ACTED UNDER COLOR OF LAW

Hayek and Awari do not dispute that the Complaint plausibly alleges their knowing participating in a conspiracy to fabricate evidence against Ramnanan in the hopes securing leniency from prosecutors.[1] Their sole defense is that the Complaint's allegations of prosecutorial pressure foreclose a finding that they were "willful participants" in that conspiracy. That argument has no support in the Complaint or the case law.

[1] Awari's protestation that this is a "fantastical script" and his attempts to disparage the believability of the allegations (Awari Br. 14-16) cannot be credited on a motion to dismiss, where all well-pled allegations are presumed true. *See Grillo v. State*, 469 N.J. Super. 267, 273(Super. Ct. App. Div. 2021) ("At this preliminary stage of the litigation the Court is not concerned with the ability of [appellants] to prove the allegation contained in the complaint.") (internal quotation marks omitted).

To succeed at the motion to dismiss stage, Hayek and Awari face a formidable burden. Because Ramnanan is entitled to all reasonable inferences, *State ex rel. McCormac v. Qwest Commc's Int'l, Inc*., 387 N.J. Super. 469, 478 (App. Div. 2006), they must establish that the Complaint's allegations permit only one conclusion: that prosecutorial pressure overwhelmed their capacity for self-determination at the very moment they provided the false testimony. Opening Br. 39-41; *United States v. Taylor*, 745 F.3d 15, 23 (2d Cir. 2014) (courts must assess degree of coercion "at the time [the statement] is given").

Hayek and Awari cannot meet this high bar. They do not identify any allegations conclusively foreclosing the possibility that their decision to join the conspiracy was a rational decision, borne of a sober cost-benefit analysis, much less any allegations showing that the decision resulted from an overborne will. Unlike *Stokes v. Eldred*, 2021 U.S. Dist. LEXIS 98535 (D.N.J. May 25, 2021), there is no allegation that State Defendants "did not allow [the defendants] to give [their] own version" of events or barred them from "freely speak[ing] of any truth." *Id.* at *11. Instead, Hayek seizes on three allegations: that State Defendants (i) "dangle[d] the possibility of no jail sentence and the opportunity to keep his license" to "induce" him to name doctors; (ii) "relentlessly pressured" him into giving a false statement; and (iii) "suborned" perjury. Hayek Br. 10-11. Awari points to the Complaint's

allegation that State Defendants fed him the statements they wished him to make against Ramnanan. Awari Br. 13-14.

As for the allegation that State Defendants induced participation in the conspiracy through offers of leniency, neither Appellee cites any case law holding that this sort of conduct negates willfulness as a matter of law. An offer of leniency is nothing more than an appeal to self-interest. And while such appeals are powerful motivators, courts have uniformly found that they do not override a defendant's agency or eliminate his or her capacity to make a rational choice about whether to cooperate. To the contrary, the law *presumes* that a defendant's decision to cooperate is freely made. *See* Opening Br. 41 (citing cases); *see also United States v. Jackson*, 608 F.3d 100, 103 (1st Cir. 2010) (upholding confession as voluntary despite police officers' "suggestion that cooperation might induce leniency").[2]

Hayek dismisses these cases as irrelevant because they do not involve Section 1983 or NJCRA joint state action claims. But courts have applied the "overborn will" test in every context relevant to the instant action, including when assessing: the voluntariness of a criminal defendant's decision to cooperate, *United States v.*

[2] *United States v. Fraction*, 795 F.2d 12, 14 (3d Cir. 1986) ("[C]ircuit courts of appeals have uniformly rejected the contention that a promise to bring cooperation to the attention of the authorities suffices to render a confession involuntary."); *United States v. Ruggles*, 70 F.3d 262, 265 (2d Cir. 1995) ("[S]tatements to the effect that it would be to a suspect's benefit to cooperate are not improperly coercive."); *accord United States v. Guarno*, 819 F.2d 28, 31 (2d Cir. 1987); *United States v. Bye*, 919 F.2d 6, 9-10 (2d Cir. 1990).

Antoon, 933 F.2d 200, 203 (3d Cir. 1991); decisions to provide statements to law enforcement, *see, e.g.*, *Or v. Elstad*, 470 U.S. 298, 304 (1985); and decisions to join unlawful conspiracies. *See, e.g.*, *United States v. Freeman*, 208 F.3d 332, 342 (1st Cir. 2000) (evidence "would have to show that the duress to which [the alleged conspirator] was subject was enough to overbear [her] will and make [her] participation in the conspiracy involuntary") (internal quotation marks omitted). Hayek offers neither legal authority nor any principled reason why a different willfulness standard would apply here—much less one that is more forgiving of parties who, for purely personal gain, knowingly join state schemes to deprive others of their civil rights.

The second allegation on which Hayek relies—that he was "relentlessly pressured"—fares no better. To start, the Complaint only uses that phrase to describe State Defendants' conduct during a *single* proffer session. Pa32. Hayek ignores the Complaint's remaining allegations that he "became fully invested in [State Defendants] shared goal of manufacturing," and that he supplied false testimony out of naked self-interest over the course of *several months*. Pa32, 35, 50 (describing two proffer sessions in 2016 and Hayeks' continued participation in the conspiracy in "early winter of 2017"). Crucially, there is nothing in the Complaint suggesting that whatever pressure existed during the first proffer session persisted during the subsequent months in which he conspired with State Defendants to create the false

"Summary Chart" that was used to bring the second indictment. *See* Opening Br. 7-8, 37-38; *Taylor*, 745 F.3d at 23 (courts must analyze coercion "at the time" of the statement in question).

Nor does the law excuse illegal conduct simply because it is motivated by some external pressure. *See, e.g., Slater v. United States*, 562 F.2d 58, 62 (1st Cir. 1976) (threat to harass a contractor and withhold future contracts "would not negate the agreement that is a necessary element of every conspiracy" because it "was not enough to overbear the contractor's will and make his participation in the conspiracy involuntary"); *Otto Milk Co. v. United Dairy Farmers Coop. Ass'n*, 261 F. Supp. 381, 385 (W.D. Pa. 1966) ("even if one is coerced by economic threats or pressure to participate in an illegal scheme, that does not make him any less a co-conspirator."), *aff'd*, 388 F.2d 789, 797 (3d Cir. 1967). Instead, as set forth in the Opening Brief (39-40), courts must conduct a detailed, fact-intensive analysis to determine whether the state pressure was so intense that it rendered the defendants' decision to join the conspiracy involuntary. Hayek and Awari do not dispute that the facts necessary to undertake that analysis are absent from the face of the Complaint.

Hayek and Awari's remaining arguments are even less persuasive. Hayek points to the Complaint's allegation that State Defendant's "suborned" perjury. But this does nothing to advance Hayek's argument: the term "suborn" only describes the intent of the person eliciting the false testimony—it does not speak to whether

responded to that solicitation voluntarily. *See, e.g., United States v. Gulkarov*, 2022 U.S. Dist. LEXIS 12597, at *17 (S.D.N.Y. Jan. 24, 2022) ("What matters is that Gulkarov and Israilov demonstrated a willingness and intent to suborn perjury; whether the physicians were willing participants or were coerced to commit perjury is secondary.").

Finally, Awari cites the Complaint's allegations that the prosecutors told him what statements to provide against Ramnanan. This, however, has no bearing on the willfulness question. Conspiracy law is unconcerned with whether a co-conspirator hatched the scheme or merely followed orders: a getaway driver is an equal member of the conspiracy regardless of whether he chose the target bank or idled his car where instructed. The key question here is whether Awari willfully repeated the statements provided by State Defendants. Based on the facts alleged in the Complaint, at the motion to dismiss stage, the answer is clearly yes.

For these reasons, the finding that that Hayek and Awari were not state actors must be reversed.

IV. HAYEK AND AWARI ARE NOT ENTITLED TO ABSOLUTE TESTIMONIAL IMMUNITY

New Jersey law is clear that statements made to law enforcement only enjoy a "qualified privilege"—one that does apply to knowingly false testimony, as is concededly alleged here. *See* Opening Br. 43. Hayek and Awari do not assert otherwise. That should close the matter.

Hayek and Awari only muddy the waters by invoking *Rehberg v. Paulk*, 566 U.S. 356 (2012). On its face, that decision only extends to witnesses who actually appear before the grand jury, which Hayek and Awari concededly did not. Their claim that they were grand jury witnesses "in effect" because their testimony was transmitted to the grand jury has zero support in the case law. *See* Opening Br. 44-45 (explaining why testimonial immunity only applies to testifying witnesses). Indeed, *Coggins v. Buonora*, 776 F.3d 108 (2d Cir. 2015), rejected that precise claim. In that case, an officer fabricated evidence during the investigative stage and then conveyed the same false story to the grand jury. *Id.* at 111. The Second Circuit squarely held that *Rehberg* did not apply, holding that a defendant cannot retroactively immunize investigative fabrications by repeating those fabrications to a grand jury. *Id.* at 113. The same applies here, but with greater force since, unlike the officer in *Coggins*, Hayek and Awari did not appear before the grand jury at all.

Finally, even if *Rehberg* did apply to non-testifying witnesses, Hayek and Awari's immunity claim would still fail because New Jersey courts have refused to apply *Rehberg* to knowingly false testimony. Opening Br. 45. For these reasons, the Superior Court's testimonial immunity finding must be reversed.

V. THE IIED CLAIMS ARE TIMELY

Appellees provide no legal authority or principled basis for excluding IIED claims from *McDonough v. Smith*'s delayed accrual rule. Ramnanan's IIED claim

stems directly from his malicious prosecution through fabricated evidence; and there is no dispute that *McDonough* applies to malicious prosecution and fabrication claims. Appellees' sole argument in opposition is that *McDonough* does not apply to causes of action that are stylized as IIED claims.

Courts have emphatically rejected such formalistic reasoning. *McDonough* itself instructed that, when affixing an accrual date, the court must look past labels and determine the "most analogous common-law tort." 588 U.S. 109, 116-17 (2019). Where a claim "challenges the integrity of [a] criminal prosecution[]" the relevant common-law analogue is malicious prosecution, which—for various "practical" reasons—does not accrue until the favorable termination of criminal proceedings. *Id.* at 118-19. Here, there is no question that the IIED claim impugns the integrity of the prosecution, and no question that forcing Ramnanan to have brought his IIED claim in the midst of his prosecution would have raised all of the same practical concerns as a malicious prosecution claim.

Lacking supportive authority of their own, Appellees make an abortive attempt to distinguish Ramnanan's. Thus, they argue that *Kelley v. Reyes*, 2020 U.S. Dist. LEXIS 114921 (D.N.J. July 1, 2020), and *Wilson v. Est. of Burge*, 667 F. Supp. 3d 785, 828-29 (N.D. Ill. 2023), are inapposite because the IIED claims arose out of a wrongful conviction—not an unlawful prosecution ending in dismissal—thus implicating the *Heck* bar. This is a distinctly unhelpful distinction. Not only did

McDonough arise from a prosecution ending in acquittal, that decision explicitly held that the "pragmatic considerations discussed in *Heck*" apply equally to malicious prosecution/fabrication claims that do not challenge a wrongful conviction. 588 U.S. 113-14, 117-19. Hayek also argues that *Manansingh v. United States*, 2023 U.S. App. LEXIS 7320 (9th Cir. Mar. 28, 2023), is inapposite because the IIED claim was brought under the Federal Tort Claims Act ("FTCA") which, he claims, required dismissal of the federal criminal proceedings before an IIED claim could be pursued. But the FTCA contains no such requirement and *Manansingh* said no such thing: instead, that case merely held that *McDonough* applied to the plaintiffs' IIED claims because, like here, they impugned the integrity of the criminal proceedings. *Id.* at *2.

The Superior Court's untimeliness finding fails for an independent reason: the Complaint contains no allegations suggesting Ramnanan could have mounted a viable IIED claim before September 15, 2018. In opposition, State Defendants cite the Complaints' allegations showing that Ramnanan knew that some of the evidence was falsified by 2018. That, however, is not remotely enough. To state an IIED claim, Ramnanan had to plausibly allege that *State Defendants* were behind the fabrication; and to defeat a qualified immunity defense, he had to allege that they acted willfully or with malice. *See* N.J.S.A. 59:3-14, 59:3-3, 59:3-8. State Defendants point to

nothing in the Complaint showing that he knew or could have known these essential facts.

Hayek's arguments in opposition are likewise unavailing. While he recites the Complaint's timeline of his participation in the conspiracy through 2016, he never establishes that Ramnanan knew before September 2018 that he was the source of the false testimony. He asserts that Ramnanan could have requested transcripts of Hayek's proffer sessions after being indicted, but he cites no authority for that claim which, being made for the first time on appeal, is waived in any event. *Nieder v. Royal Indem. Ins. Co.*, 62 N.J. 229, 234 (1973) (appellate courts will not consider new issues on appeal).[3]

Awari's opposition consists of one unsupported sentence that Ramnanan should have discovered his role in the evidence fabrication scheme. As such, his opposition on this point should be deemed waived. *Ramapo Brae Condo. Ass'n, Inc. v. Bergen Cty. Hous. Auth.*, 328 N.J. Super. 561, 582 (App. Div. 2000); *U.S. Bank Nat. Ass'n v. Curcio*, 444 N.J. Super. 94, 114 (App. Div. 2016) (court will not

[3] Whether those transcripts would have disclosed the conspiracy is unknown on the current record, which further illustrates the need for a hearing. Hayek claims in a footnote that a *Lopez* hearing was not required because Ramnanan never filed a certification establishing a factual dispute. But the contrary facts were set forth in the Ramnanan's opposition below, and Hayek cites no authority requiring a separate certification before a hearing can be held.

consider "unsupported and conclusionary statement" on appeal) (quotation marks omitted).

Lastly, State Defendants assert that the IIED claim is barred by N.J.S.A. 59:3-3 and 59:3-8. But the qualified immunity codified in those provisions disappears where an official commits "a crime, actual fraud, actual malice or willful misconduct." N.J.S.A. 59:3-14; *Jobes v. Evangelista*, 369 N.J. Super. 384, 395 (Super. Ct. App. Div. 2004). The Complaint's detailed allegations of intentional evidence fabrication and malicious prosecution plainly satisfy this exception.

For these reasons, the Superior Court's untimeliness finding should be reversed.

CONCLUSION

For the foregoing reasons, the order below should be reversed in its entirety.

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